Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MARIA V. CRUZ, for herself and as representative of GUSTAVO CRUZ and JOAQUIN RODRIGUEZ, minors; BEATO CRUZ; SANDRA MARIA CRUZ as representative of YOVARY POLANCO, a minor; JOSE ALFREDO GOMEREZ; and LENOR DURAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that air carriers can be denied the benefit of the Warsaw Convention's limitations on liability on the basis of non-prejudicial technical omissions in documentation provided for in the Convention?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceeding in the court below.

RULE 29.6 STATEMENT

Petitioner's parent corporation is AMR Corporation, a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner American Airlines, Inc., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., *infra*, 1a-14a) is reported at 199 F.3d 526 (D.C. Cir. 1999). The orders denying the timely filed petition for rehearing and rehearing *en banc* (App., *infra*, 64a-67a) are not reported. The opinions and orders of the United States District Court for the District of Columbia (App., *infra*, 15a-63a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1999. A timely petition for rehearing and rehearing *en banc* was denied on November 26, 1999. App., *infra*, 64a-67a. On February 10, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 27, 2000. *See* Application No. 99A643. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISIONS AND STATUTES INVOLVED

The Articles of the Warsaw Convention (the "Convention")[1] most pertinent to the resolution of this case

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, note following 49 U.S.C. § 40105 (1994). In September 1998 the United States Senate ratified

[Footnote continued on next page]

are Articles 3, 4 and 22(2). Other Articles of the Convention, pertinent to a lesser degree, are reprinted in the Appendix pursuant to this Court's Rule 14(f).

The English-language translation of Article 4 of the Warsaw Convention provides as follows:[2]

> (1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.
>
> (2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.
>
> (3) The baggage check shall contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;

[Footnote continued from previous page]
Montreal Protocol No. 4, which modified the text of the Convention in certain respects. *See* Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, *reprinted in* S. EXEC. REP. NO. 105-20, at 21-32 (1998); *see also* App., *infra*, 8a-9a & n.4; *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 160 & n.2, 174 (1999). Except where otherwise noted, all references to the Warsaw Convention in this petition are to the original text of the Convention.

[2] The Warsaw Convention was written in French, and the original French text controls in the event of any conflict or ambiguity between the English-language translation and the original French. *Tseng*, 525 at 162 n.4; *Air France v. Saks*, 70 U.S. 392, 397 (1985).

(c) The name and address of the carrier or carriers;

(d) The number of the passenger ticket;

(e) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(f) The number and weight of the packages;

(g) The amount of the value declared in accordance with article 22(2);

(h) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

49 Stat. 3015-16.

The English-language translation of Article 22(2) of the Warsaw Convention provides as follows:

In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to

> pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

49 Stat. 3019.

STATEMENT OF THE CASE

This case involves the proper construction of a treaty of world-wide application, popularly known as the Warsaw Convention. The Convention generally creates and governs the rights and obligations of international air passengers, shippers, and carriers, and it has pre-emptive impact within signatory countries on laws that would otherwise govern relationships between those parties. Particularly relevant to this case are Articles of the Convention that impose monetary limitations on international passengers who seek to recover for baggage that is checked to and subsequently lost by a carrier—Articles that are implicated numerous times each day.

A. The Loss of Checked Baggage

The facts relevant to the question presented by American Airlines in this petition are not in dispute. Respondents purchased tickets in December 1995 to travel from Washington's National Airport (subsequently renamed Reagan National Airport) to Santo Domingo in the Dominican Republic. Each of the respondents checked two suitcases at National Airport and were issued baggage checks or claim stubs for each suitcase. App., *infra*, 2a. The baggage checks issued to respondents did not indicate the weight of any of the suitcases. *Id.* at 2a, 16a, 23a-24a, 55a.

Four of the checked suitcases never arrived in Santo Domingo, and a fifth finally arrived damaged and empty. App., *infra*, 2a, 16a-17a. After American Airlines denied their lost luggage claims on grounds not relevant here, respondents brought an action in the district court seeking to recover about $15,000—what they claimed to be the actual value of the five suitcases and

their contents. American, conceding liability, moved for partial summary judgment on respondents' claims to the extent that the $15,000 monetary value as asserted by respondents exceeded the limitation on liability imposed by Article 22(2) of the Warsaw Convention. Under that limitation, international passengers may recover a maximum of $9.07 per pound of luggage lost. *Id.* at 2a-4a, 17a, 48a.

Under American's policies and practice, pieces of baggage weighing more than a specified weight—usually 70 pounds, but in this case 100 pounds—are selected out for the imposition of an excess-baggage charge. The weight of a piece of baggage, whether or not selected out, is not necessarily recorded on the baggage claim stub issued by American. Instead, as reflected in American's tariff, any lost piece of baggage is deemed to weigh the maximum free allowable weight unless a notation to the contrary is made on the passenger's ticket.[3] Thus, a passenger who loses a checked bag is routinely reimbursed the full $9.07 per pound multiplied by the maximum free allowable weight of the lost luggage, even if the lost luggage in fact weighed less—even much less—than the maximum. Baggage weighing in excess of the free allowable weight, if lost, would be valued based on its weight as indicated in documents evidencing the excess-baggage charge. App., *infra*, 7a n.3, 23a-25a, 48a-49a & n.4,

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[3] American's tariff on file with the Department of Transportation provides that "[f]or the purpose of determining liability under the [Warsaw] [C]onvention with respect to passenger baggage . . ., the weight of each piece of such baggage shall be deemed to be the maximum free allowable weight for each piece of such baggage under the Rule unless the actual weight is stated on the passenger's ticket." C.A. App. 326 (quoting Tariff 55(C)(3)(b), Note 2, at AA-66 (eff. Feb. 12, 1989)); *see also* App., *infra*, 4a, 23a-24a.

55a-56a. In this case, it was conceded that three of the five bags at issue exceeded the free allowable weight by at most 175 pounds (in the aggregate). *Id.* at 57a-58a.

B. The District Court's Decision

Closely adhering to a prior decision of the same court handed down in 1983, *Martin v. Pan Am. World Airways, Inc.*, 563 F. Supp. 135 (D.D.C. 1983), as well as a number of decisions of the United States Court of Appeals for the Second Circuit, *e.g.*, *Republic Nat'l Bank v. Eastern Airlines, Inc.*, 815 F.2d 232 (2d Cir. 1987), the district court ruled on alternative grounds that the absence of the weight of each bag on each baggage claim stub did not destroy American's right to rely on the Convention's liability limitation. First, the court—looking to the plain language of the Convention itself—pointed out that under Article 4(4) of the Convention, a carrier in American's position is stripped of the liability limitation only when the baggage claim stub provided to the passenger "does not contain the particulars set out at [paragraphs] (d), (f) *and* (h)" of Article 4(3). App., *infra*, 22a (emphasis added by the district court). Concluding that it was not entitled to transform the conjunctive, "and," into the disjunctive, "or," the court held that the limitation on liability was not destroyed so long as the carrier included in the baggage claim stub at least one of the pieces of information found in either paragraph (d), (f), or (h) of Article 4(3). App., *infra*, 22a.

Noting that other courts—while reaching the same result as it had reached—had found some ambiguity in Article 4(4)'s use of the word "and," the district court also engaged in an interpretive analysis of the same language of the Convention and concluded that the result was the same. The court reasoned that the appearance of the actual weight of any checked bag on the baggage claim stub serves two distinct purposes. First, the actual weight fixes the liability of the carrier and the basis of the passenger's recovery for loss. Because American's

tariff treats each checked bag for which no overweight charge was imposed as if it weighed the full allowable free weight—the "deemed weight" rule—all passengers, including respondents, had a fixed basis for recovery and American had a fixed amount of liability. Indeed, unless a passenger's checked bag weighed exactly the maximum free allowable weight, that passenger's recovery would always be greater than the passenger would otherwise be entitled to recover under the Convention.[4] App., *infra*, 23a-24a, 55a-58a & n.6.

A second purpose of the weight provision identified by the district court was to alert passengers to the fact that unless they purchased additional insurance for the contents of their bags, their recovery would be limited by the Convention. Here, reasoned the district court, respondents had fully adequate notice of the limitation and the opportunity to purchase insurance if they wanted to do so. App., *infra*, 23a-25a. Moreover, case law indicates that tariffs identical to American's on this issue were embraced by other companies in the airline industry, such as Pan American and British Airways. App., *infra*, 23a-24a. In short, the district court was unable to find any prejudice to respondents as a result of American's practice of not placing the weight of each bag on the baggage claim stub. Finding no prejudice, the district court refused to lift the limitation on liability to which American was entitled under the Convention. *Id.* at 26a.

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[4] Where, as here, a piece of baggage weighed more than the maximum free allowable weight, a separate document testifying to the passenger's payment of an extra baggage charge based on the extra weight would be issued and would thereafter establish the amount owed by American for the loss of that baggage—the maximum total weight multiplied by $9.07. App., *infra*, 57a-58a.

C. The Court of Appeals Decision

As they had done in the district court, respondents argued in the court of appeals that American's failure to state the weight of each suitcase on the baggage claim stubs precluded American's reliance on the liability limitations of the Convention. The court of appeals acknowledged that requiring a carrier to record the weight of a checked bag would serve absolutely no purpose "so long as a carrier's deemed-weight rules favor its passengers." App., *infra*, 7a. Moreover, the court conceded that "the district court's interpretation [of Article 4] is linguistically possible." *Id.* at 6a. Notwithstanding this concession, the court of appeals found no ambiguity in the pertinent language of the Convention, asserting that "the language of the Convention is unyielding." *Id.* To the court of appeals, the word "and" as used in Article 4(4) of the Convention had to be read in the disjunctive—as "or"—notwithstanding that the district court and many other courts had found the relevent text at least ambiguous and therefore requiring an interpretive analysis. Characterizing those other decisions as having "ignore[d] the requirements of Article 4(4)," the court professed that it could not ignore what it saw as the unambiguous meaning of the word "and" and stated that "[i]f there are circuit conflicts, it is for the Supreme Court to supply uniformity." App., *infra*, 8a.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because The Rule Of Law Adopted By The Court Below Is Inconsistent With The Approach To Application Of The Warsaw Convention Adopted By Numerous Other Courts

The court of appeals held that a failure to comply with the precise details of the notice requirements set forth in the Warsaw Convention categorically deprives airlines of the benefit of the Convention's liability limi-

tations, even where, as here, it is undisputed that no prejudice resulted from the challenged omission. That holding is consistent with the Ninth Circuit's decision in *Spanner v. United Airlines, Inc.*, 177 F.3d 1173 (9th Cir. 1999).

By contrast, however, numerous federal, state, and foreign courts have rejected this unduly strict approach to the interpretation of the Warsaw Convention, holding instead that an air carrier's technical non-compliance with one or more of the various notice requirements set forth in the Convention will not deprive the carrier of the benefit of the Convention's liability limitations in the absence of prejudice to the affected passenger or shipper. This Court's review is necessary to resolve this conflict and clarify the governing interpretive approach to application of the Warsaw Convention.

A number of federal and state appellate courts have held that an air carrier's technical, non-prejudicial failure to comply with a strict reading of the Convention's requirements will not result in a loss of the Convention's protections. In *Republic National Bank v. Eastern Airlines, Inc.*, 815 F.2d 232 (2d Cir. 1987), for example, the defendant airline had failed to specify any of the items required by a strict reading of Article 4 of the Convention, including the weight of the bags and notice of the applicability of the Convention. *Id.* at 237. Under the circumstances of the case, however, "the absence of the printed notice and weight of the bag did not prejudice [the plaintiff]," nor did the absence of other information. *Id.* at 237-38.[5] As a result, the court held, "'the particu-

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[5] The *Republic National Bank* court's discussion of the baggage weight notation requirement is particularly instructive, and highlights the conflict among the authorities. As the Second Circuit explained, "the purpose of the weight requirement is to enable passengers to calculate the amount re-

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lars missing from [the baggage check] . . . were technical and insubstantial omissions that did not prejudice the shipper and were of little commercial significance.' Consequently, their omission will not preclude [the air carrier's] assertion of liability limitations." *Id.* at 238 (citation omitted).[6]

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coverable from the carrier under the Warsaw Convention for lost or damaged baggage. . . . A passenger need only multiply the amount recoverable per pound under the Convention ($9.07) by the weight of his baggage to arrive at this figure. Once having made the calculation, a passenger has enough information to decide whether to purchase insurance." 815 F.2d at 237. Because the shipper in *Republic National Bank* was on notice that the value of its luggage far exceeded the maximum amount available under the Warsaw Convention, the court concluded that the purpose of the baggage weight requirement had been satisfied. *Id.* at 238. By the same token, the effect of American Airlines' deemed-weight rule was to place respondents on notice of the maximum amount they could recover for lost baggage without purchasing insurance, so under the reasoning of the *Republic National Bank* court the Convention's limitation on liability should have been applied.

[6] *Accord, e.g., Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 160 (S.D.N.Y. 1996) (Warsaw Convention's liability limitation for lost baggage applied despite absence of "evidence showing how much [the passenger's] suitcase weighed," because "[w]here the weight of a passenger's baggage is not noted on the baggage check, the weight may be based on the maximum allowable weight as set forth in the airline's tariff"), *rev'd in part, aff'd in pertinent part*, 122 F.3d 99, 108 (2d Cir. 1997), *rev'd in part on other grounds*, 525 U.S. 155, 165 n.8 (1999); *Gonzalez v. Taca Int'l Airlines*, Civ. A. No. 91-0175, 1992 WL 142399, at *4 (E.D. La. June 18, 1992); *Abbaa v. Pan Am. World Airways, Inc.*, 673 F. Supp. 991, 993 (D. Minn. 1987) ("technical failures to comply with the Warsaw Convention will not preclude ap-

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Several state appellate courts have adopted the same rule, enforcing the Warsaw Convention's baggage liability limitations despite technical, non-prejudicial omissions of particular disclosure details set forth in the Convention. In *Feeney v. America West Airlines*, 948 P.2d 110 (Colo. Ct. App. 1997), for example, the Colorado Court of Appeals held that an airline's alleged failure to include on a baggage check an adequate notation of the weight and number of bags did not deprive the airline of the benefit of the Warsaw Convention. *Id.* at 114-15. Relying on *Republic National Bank* and other federal cases (*id.* at 112), the court held that "[f]ailure to follow the technicalities of the Convention does not preclude the appplicability of its liability limitations." *Id.* at 114.

Similarly, in *Hibbard v. Trans World Airlines, Inc.*, 592 N.E.2d 889 (Ohio Ct. App. 1990), the court rejected a passenger's attempt to avoid the Convention's liability limitations on the ground that the airline had failed to note the number or weight of the bags on the baggage check. Holding that "[t]echnical and insubstantial omissions of Article 4 that do not prejudice the passenger will not prevent an air carrier from availing itself of the Convention's limitation on liability," the court con-

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plying the limitations on liability when the omissions have not prejudiced the claimants"; "[h]ere the plaintiffs were not prejudiced by [the airline's] failure to note the weight of the baggage"); *Martin v. Pan Am. World Airways, Inc.*, 563 F. Supp. 135, 139-41 (D.D.C. 1983). *But see Da Rosa v. Tap Air Portugal*, 796 F. Supp. 1508, 1509-10 (S.D. Fla. 1992); *Vekris v. Peoples Express Airlines, Inc.*, 707 F. Supp. 675, 678 (S.D.N.Y. 1988); *Gill v. Lufthansa German Airlines*, 620 F. Supp. 1453, 1456 (S.D.N.Y. 1985); *Maghsoudi v. Pan Am. World Airways, Inc.*, 470 F. Supp. 1275, 1278-80 (D. Haw. 1979).

cluded that "[the airline] is entitled to avail itself of the . . . liability limitation despite the Article 4 omissions from [the passenger's] baggage check." 592 N.E.2d at 892. *See also Lourenco v. Trans World Airlines, Inc.*, 581 A.2d 532, 534, 537 (N.J. Super. Ct. Law Div. 1990) (noting that "[t]he cases demonstrate a considerable split in authority" regarding the significance of an airline's failure to comply strictly with Article 4's weight-notation specification, but concluding that "the failure to record the weight and number of plaintiffs' luggage on the baggage check is a technical and insubstantial omission and should not deny defendant the benefit of the limitation of liability provisions of the Warsaw Convention").[7]

This same rule of treaty interpretation has also been applied in cases involving the Convention's requirement that air carriers must deliver to passengers tickets and baggage checks containing a written notice of the applicability of the Warsaw Convention's limitations on liability. In *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982), for example, the passenger was given only a domestic ticket, but no international ticket was delivered. Determining that the dispositive question was whether this omission "is simply a technical irregularity or one that goes to the very heart of the Convention's delivery requirement," the court looked to the underlying purpose of the notice requirement, holding that "the key factor is whether the passenger had a reasonable opportunity to take precautions against the limita-

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[7] The New York state courts, by contrast, take the opposite view. *See, e.g., Arkin v. New York Helicopter Corp.*, 544 N.Y.S.2d 343, 345-46 (N.Y. App. Div. 1st Dep't 1989); *Kupferman v. Pakistan Int'l Airlines*, 438 N.Y.S.2d 189, 191-92 (N.Y. Civ. Ct. 1981); *Hill v. Eastern Airlines, Inc.*, 425 N.Y.S.2d 715, 716 (N.Y. Civ. Ct. 1980).

tion of liability." *Id.* at 411. Under the circumstances of that case, the court concluded that "the passenger is assumed to know the flight was international and the Convention does apply," despite the airline's technical noncompliance with the delivery requirement. *Id.* at 413-14.

A number of state appellate courts have reached the same conclusion. *See, e.g., Feeney v. America West Airlines*, 948 P.2d 110, 112-13 (Colo. Ct. App. 1997) (finding Convention's liability limitations applicable despite alleged lack of strict compliance with requirement of notice of Convention's applicability, because notice given "was adequate to notify plaintiffs of the potential applicability of the Convention's limitation provisions"); *Ross v. Pan Am. Airways, Inc.*, 85 N.E.2d 880, 884 (N.Y. 1949) (finding Warsaw Convention liability limitations applicable as a matter of law despite passenger's claim that "no ticket was ever delivered to her or anyone authorized by her," because the "general purport and purpose of the Convention" had been satisfied).

Essentially the same issue has also arisen in cases involving Article 8 of the Convention, which specifies the required contents of air waybills for international cargo shipments. The version of Article 8 in effect prior to ratification of Montreal Protocol No. 4 stated that an air waybill must specify various particulars regarding the shipment covered by the waybill, including the number and weight of the packages and a statement that the shipment is subject to the Convention's liability limitations. Warsaw Conv., art. 8(h), (i), & (q), 49 Stat. 3016-17. The Convention further provided that "if the air waybill does not contain all the particulars set out in article 8(a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability." Warsaw Conv., art. 9, 49 Stat. 3017.

In direct contrast to the wooden and hypertechnical reading of the Convention adopted by the court below, a

number of courts have held that the failure to record all of the specified particulars in an air waybill does not necessarily deprive the air carrier of the Convention's limitations on liability where the error was merely technical and did not result in prejudice to the shipper. Thus, in *Exim Indus., Inc. v. Pan Am. World Airways, Inc.*, 754 F.2d 106 (2d Cir. 1985), the Second Circuit rejected the contention that "technical and insubstantial omissions that did not prejudice the shipper" rendered the liability limitations inapplicable. *Id.* at 108. Instead, the *Exim* court held that a non-prejudicial omission from a waybill "is not a ground for denying limitation of liability." *Id.*; *see also Distribuidora Dimsa v. Linea Aerea del Corbre S.A.*, 976 F.2d 90, 97 (2d Cir. 1992) (reaffirming *Exim*, the court held that "unless omission of a particular is commercially substantial or significant and prejudicial to the consignor, it need not be included in the air waybill for the carrier to avail itself of Article 22(2)'s limitation on liability").[8]

The Third Circuit has adopted the same no-prejudice rule in interpreting the particularized requirements of the Warsaw Convention. In *Onyeanusi v. Pan Am*, 952 F.2d 788 (3d Cir. 1992), the court held: "Although the waybill did not describe the method in which the [shipment] was packed [and thereby failed to comply with Article 8(h)], this was a 'technical and insubstantial omission[]'

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[8] In *Maritime Ins. Co. v. Emery Air Freight Corp.*, 983 F.2d 437 (2d Cir. 1993), the Second Circuit declined to extend the rule announced in *Exim* beyond the particulars required by subsections (h) and (i) of Article 8, which called for specification of the number of packages, the method of packing, and the weight, quantity, volume, or dimensions of the goods. *Id.* at 439-41. The court recognized, however, that the rule announced in *Exim* continued to govern with respect to the particulars set forth in Article 8(h) and (i).

which does not affect the Convention's limitation of liability." *Id.* at 794 (quoting *Exim*, 754 F.2d at 108).

A number of foreign jurisdictions have taken this same approach to interpretation of the Warsaw Convention, rejecting attempts in insist on a strict construction of the Convention that elevates form and technicalities over commercial realities. For example, in *Corocraft Ltd. v. Pan Am. Airways Inc.*, [1969] 1 Q.B. 616, [1968] 3 W.L.R. 1273, [1969] 1 All E.R. 82, the British Court of Appeal refused to construe Article 8 of the Convention in a strictly literal fashion so as to deprive an airline of the benefit of the liability limitations on the basis of a technical, non-prejudicial failure to set forth certain of the details called for by a literal reading of the Convention's requirements. In that case, the air waybill did not disclose the quantity or dimensions of the shipped goods despite the Convention's requirement that the waybill specify "the weight, the quantity and the volume or dimensions of the goods." [1969] 1 Q.B. at 650 (quoting British translation of Article 8(i)). In response to the plaintiffs' contention that this lack of specificity rendered the liability limitation inapplicable by virtue of Article 9, the court concluded that "the point of law raised by the [plaintiffs] is a highly technical point, devoid of all merit." *Id.* at 651. Rejecting the strictly literal approach, the court held "that article 8(*i*) should be read as saying that those particulars are to be given *so far as applicable*." *Id.* at 655 (emphasis in original); *see also id.* at 655-56 ("[A]rticle [8] does not require that the [waybill] should state every particular, no matter how useless or irrelevant. It only requires those particulars to be stated so far as they are necessary or useful to the purpose in hand.").[9]

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[9] The *Corocraft* court also concluded in the alternative that the original French text of Article 8(i) was ambiguous be-

[Footnote continued on next page]

As the Second Circuit noted in *Exim*, the approach enunciated in the *Corocraft* case, which emphasizes practical realities over strict interpretation of the Convention's technical requirements, has also been adopted by the courts of other signatories. *Exim*, 754 F.2d at 108 (noting that "several foreign courts have rejected" the strict interpretation of Article 8 and have held "that only those particulars having practical commercial significance with respect to the shipment involved need be incorporated in the waybill"). The *Exim* court pointed to decisions of the British, Swiss and Dutch courts adopting this interpretive approach. *See id.* (citing *Corocraft* [1969] 1 Q.B. 616; *Dico Handel-en Industrie Mij. N.V. v. Garuda Indonesian Airways, P.N.*, No. 83 Schip en Schade 1970, 199 (Dist. Ct. Amsterdam, Oct. 29, 1969); and *Black Sea & Baltic General Ins. Co. Ltd. v. Scandi-*

[Footnote continued from previous page]
cause it did not expressly specify whether the list of informational items to be included in a waybill was intended to be read in the conjunctive or disjunctive. [1969] 1 Q.B. at 654-55; *accord*, *e.g.*, *Distribuidora Dimsa*, 976 F.2d at 96 ("the original French can be read either disjunctively or conjunctively," and the English-language translation's insertion of the word "and" in an attempt to make the list conjunctive was therefore not binding). The language of Article 4(4) at issue here contains a similar ambiguity: The English-language translation states that the liability limitations will not apply "if the baggage check does not contain the particulars set out at (d), (f), *and* (h) above" (49 Stat. 3016 (emphasis added)), but the original French merely lists "les lettres d), f), h)" without specifying either the disjunctive or conjunctive. 49 Stat. 3002 (liability limitations inapplicable "si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h)"). Moreover, as the district court noted below, even if read in the conjunctive in accordance with the English-language translation, this passage literally means that compliance with any one of the particulars entitles the airline to the benefit of the liability limitations. App., *infra*, 22a-23a.

navian Airlines System (Zurich High Court, 2d Civ. Chamber (March 4, 1966)).[10]

These foreign cases are particularly significant because this Court has repeatedly emphasized the need to harmonize this Nation's interpretive approach to the Warsaw Convention with the approach taken by our sister signatories. "The cardinal purpose of the Warsaw Convention . . . is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169 (1999) (quoting *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991)). In keeping with that overriding purpose, this Court has consistently looked to the interpretations adopted by other nations in determining the appropriate construction of the Convention. *See, e.g., Tseng*, 525 U.S. at 175-76 ("[d]ecisions of the courts of other Convention signatories corroborate our understanding of the Convention's preemptive effect," and the Court thus "adhere[d] to a view of the treaty's exclusivity shared by our treaty partners"); *Air France v. Saks*, 470 U.S. 392, 404 (1985) (in construing the Warsaw

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[10] Foreign courts have also applied this rule in construing the Convention's requirement that air carriers provide notice of the applicability of the Convention's liability limitations. In *Samuel Montagu & Co. v. Swiss Air Transp. Co.*, [1966] 2 Q.B. 306, [1966] 2 W.L.R. 854, [1966] 1 All E.R. 814, [1966] 1 Lloyd's Rep. 323, for example, the British Court of Appeal held that the Convention's liability limitations applied despite the plaintiffs' claim that the waybill failed to provide notice of the Convention's applicability in the manner required by Article 8(q). *See* [1966] 2 Q.B. at 314 ("I do not think we should give a strict interpretation to article 8(*q*) in the Convention. We should not give it so rigid an interpretation as to hamper the conduct of business. I do not interpret the article as meaning that the waybill must contain the statement verbatim.") (opinion of Lord Denning, M.R.).

Convention, "we 'find the opinions of our sister signatories to be entitled to considerable weight'") (citation omitted). The decision below thus conflicts not only with the foreign precedents discussed above, but also with this Court's mandate that the courts of this Nation must be guided by principles of international uniformity in construing the Convention.

The court below asserted that its rigid and formulaic approach to interpretation of the Warsaw Convention was compelled by this Court's observation in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989), that "where the text is clear, we have no power to insert an amendment." App., *infra*, 7a; *see also Spanner*, 177 F.3d at 1176. As the district court correctly observed, however (App., *infra*, 22a-23a), a truly literal application of the text of Article 4 would yield a result opposite to that reached by the court below, and thus it is hardly "clear" that the text compels the result reached below. *See id.* at 6a (conceding that "the district court's interpretation is linguistically possible"); *see also supra* note 9.

In any event, the Second Circuit has squarely rejected the reasoning adopted below, expressly holding that the interpretive approach enunciated in *Republic National Bank* and *Exim* survived this Court's decision in *Chan* and continues to govern the enforceability of the Warsaw Convention's liability limitations. *See Distribuidora Dimsa*, 976 F.2d at 97 ("There being no basis for [the] claims that . . . *Exim* was overruled [by *Chan*], we abide by *Exim*'s holding that unless omission of a particular is commercially substantial or significant and prejudicial to the consignor, it need not be included in the air waybill for the carrier to avail itself of Article 22(2)'s limitation on liability."); *see also Victoria Sales Corp. v. Emery Air Freight, Inc.*, 917 F.2d 705, 711-13 (2d Cir. 1990) (van Graafeiland, J., concurring in part and dissenting in part) (reaching same conclusion).

Thus, the division of authority among the lower state and federal courts and foreign courts continues to persist and widen. This Court's review is necessary to resolve this division of authority and provide a clear rule to guide federal and state courts faced with claims that the Warsaw Convention's limitations on liability have been rendered inapplicable by technical, non-prejudicial departures from the strict terms of the Convention.

II. The Court Of Appeals' Conclusion That Montreal Protocol No. 4 Is An Amendment To, Rather Than A Clarification Of, Article 4 Of The Warsaw Convention Is Inconsistent With This Court's Precedent And With The Analysis Employed By The Eleventh Circuit

The court of appeals refused to construe the Warsaw Convention in light of Montreal Protocol No. 4, which makes clear that air carriers are entitled to the benefit of the Convention's limitations on liability notwithstanding any failure to record details such as the number and weight of a passenger's bags. App., *infra*, 8a-9a & n.4; *see also id.* at 69a. The court opined that it was not "the least bit impressed" by American's argument that Montreal Protocol No. 4 clarifies the requirements of Article 4 and is therefore applicable to this case. *Id.* at 8a. The court of appeals' ruling on this issue is inconsistent with the decisions of other appellate courts.

In *Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000), the Eleventh Circuit held that Montreal Protocol No. 4 merely clarified, rather than amended, Article 25 of the Warsaw Convention which, as originally adopted, excluded "willful misconduct" from the protection of the Convention's liability limitations. In concluding that Montreal Protocol No. 4 was a clarification rather than an amendment, the *Cortes* court expressly rejected the "intuitively appealing" argument that "because the new language significantly alters the text of the original

Convention, the original Convention's language may be presumed to have meant the opposite." *Id.* at 1283. Instead, the court held that "an amendment containing new language may be intended 'to clarify existing law . . . or to overrule wrongly decided cases.'" *Id.* (citation omitted).

The *Cortes* court emphasized that "[a] significant factor" in determining whether an amendment clarifies (rather than substantively changes) prior law "is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the amendment was enacted." 177 F.3d at 1283. As the court explained, "[i]f such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law." *Id.* at 1283-84. Examining the precedents construing the prior version of Article 25, the *Cortes* court discovered "a body of law that frequently is inconsistent and that provides a vague and nebulous definition of willful misconduct . . . . Under these circumstances, this ambiguity supports a conclusion that Montreal Protocol No. 4 clarifies, rather than effects a substantive change to, Article 25." *Id.* at 1287.

As demonstrated in Part I above, and as the court of appeals conceded below (App., *infra*, 8a), the lower federal courts are sharply divided over the question presented in this petition. Under the approach followed by the Eleventh Circuit in *Cortes*, that deep division among the lower federal and state courts militates strongly in favor of the conclusion that the Montreal Protocol's revisions to Article 4 of the Convention were merely clarifying in nature, and thus are fully applicable in this case. The court below, however, gave absolutely no weight to that division of authority, blithely maintaining that "it is for the Supreme Court to supply uniformity." App., *infra*, 8a. The approach followed by the court below is thus inconsistent with the Eleventh Circuit's test for ascertaining the clarifying nature of legislation. This dis-

pute over the proper standards for determining whether a treaty revision is merely "clarifying" rather than a substantive change in the law provides a further justification for this Court's review.

The decision of the court of appeals in this case also cannot be reconciled with this Court's recent decision in *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999). In that case, the substantive question decided by this Court was whether the Convention precluded the maintenance of an action based on state law where the Convention itself did not authorize recovery for the damages claimed. There, as here, the substantive legal question had been definitively resolved by the Senate's ratification of Montreal Protocol No. 4. *Id.* at 160-61. Thus, the question before this Court was whether Protocol No. 4 clarified, but did not change, the meaning of the Convention, because if Protocol No. 4 served only to clarify the meaning of the Convention, the plaintiff could not maintain the action that she had brought under New York law for an alleged injury that had occurred almost five years before the ratification of Protocol No. 4.

In considering the purpose of the Convention and Protocol No. 4, this Court emphasized both the "'cardinal purpose'" of the Convention to "'achiev[e] uniformity of rules governing claims arising from international air transportation'" and the desire of the signatories to prohibit situations in which carriers "might be exposed to unlimited liability under diverse legal regimes . . . ." 525 U.S. at 171 (citation omitted). Here, the interpretation of the Convention adopted by the court of appeals offends both of these purposes. As demonstrated above, the interpretation of the Convention by the court of appeals produces non-uniformity. More strikingly, the interpretation given to the Convention by the court of appeals potentially subjects American (and other international carriers) to absolutely unlimited liability based on American's completely reasonable interpretation of the Convention.

American's understanding of the meaning of Article 4(4) of the Convention was publicly known through the tariffs it had filed with the Department of Transportation. Furthermore, when the Senate ratified Montreal Protocol No. 4, the courts of this country were clearly divided on the question presented by this petition. Under these circumstances, *Tseng* counsels that Protocol No. 4 is to be regarded as clarifying existing provisions of the Convention unless there is substantial legislative history to the contrary. There is, however, no such legislative history here, nor does the court of appeals suggest to the contrary. In its opinion, the court of appeals simply rejects out-of-hand American's position that Protocol No. 4 is to be viewed as clarifying the historical meaning of Article 4(4) and, in so doing, violates the rule laid down by *Tseng*. Review is warranted for this reason as well.

III. The Question Presented Is An Important And Recurring One, And Review Is Essential To Serve The Compelling Need For Uniform Interpretation Of The Warsaw Convention

As the foregoing discussion demonstrates, state and federal courts are frequently asked to determine whether strict compliance with the technical requirements of the Warsaw Convention is an absolute prerequisite to enforcement of the Convention's limitations on liability. To be sure, Montreal Protocol No. 4 deletes from the Warsaw Convention's text any specific reference to the notation of baggage weight on baggage checks. That fact, however, does not militate against review here, because the fundamental question of treaty interpretation at issue in this case has application to a variety of the Convention's provisions and is susceptible of uniform resolution by this Court. Either the courts of this Nation are permitted to enforce the Warsaw Convention's liability limitations in the absence of prejudicial non-compliance, or they are not. Only this Court is in a position to re-

solve that issue and provide essential guidance to the lower courts regarding the appropriate interpretive rule to govern application of the Warsaw Convention.

Notwithstanding the ratification of Montreal Protocol No. 4, it is clear that the question presented in this petition will continue to arise with considerable frequency in the future. Indeed, the amended version of the Warsaw Convention continues to impose specific notice and delivery requirements on air carriers and denies them the benefit of the liability limitations in certain cases of non-compliance with those requirements. In particular, the amended Convention expressly requires airlines to deliver a passenger "ticket" and "baggage check" and to include in such tickets and baggage checks "a notice to the effect that . . . the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." *See* Warsaw Convention, as amended, art. 3(1) & 3(1)(c) (passenger ticket and notice requirements); *id.* art. 4(1) & 4(1)(c) (baggage check and notice requirements); *see* App., *infra*, 68a-69a (reprinting pertinent provisions of amended Convention). The amended Convention further provides that the carrier "shall not be entitled to avail himself of the [liability limitation] provisions of Article 22" if the carrier fails to supply the requisite ticket or baggage check or if the carrier fails to provide the requisite notice of the Warsaw Convention's applicability and effect. *Id.* arts. 3(2), 4(2); *see* App., *infra*, 68a-69a.

Thus, the very question at issue in this petition—*i.e.*, whether technical, non-prejudicial omissions or imperfections in compliance with the Convention's requirements can deprive an airline of the benefit of the limitations on liability—can and will continue to arise in future cases. Indeed, many of the cases discussed above involved alleged deficiencies in the required notice regarding the applicability of the Warsaw Convention's

liability limitations, and there is no reason to believe that such issues will arise with any less frequency in the future. *See, e.g., Stratis*, 682 F.2d at 412-13; *Exim Indus.*, 754 F.2d at 107-08 (enforcing liability limitation despite technical flaw in describing applicability of liability limitations); *Feeney*, 948 P.2d at 112-13 (same).[11]

In short, the question presented here survives ratification of Montreal Protocol No. 4. As a consequence, the existing conflict among the authorities on this issue, which has only been exacerbated by the decision below, will continue to produce inconsistent results in legally indistinguishable cases until finally resolved by this Court. Prompt review is therefore warranted.

Review is also warranted because of the importance of the question presented in this case, as evidenced by the court of appeals' departure from controlling principles of treaty interpretation that have traditionally guided this Court's jurisprudence. In the first place, as discussed above, this Court has repeatedly emphasized the special importance attached to international uniformity in interpreting the Warsaw Convention, yet the court of appeals' interpretive approach is directly at odds with that consideration. *See supra* pp. 15-18.

Second, and equally importantly, the decision below flies directly in the face of this Court's recognition that "[t]reaties are construed more liberally than private agreements," and that in determining the meaning of a

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[11] The question presented in this case is also directly relevant to a number of putative class action lawsuits currently pending against American and other air carriers in federal district court, including this case. *See, e.g.*, App., *infra*, 4a-5a n.2; *Curtin v. United Airlines, Inc.*, No. 99-CV-3056 (RCL) (D.D.C.); *Lassow v. Northwest Airlines*, No. 99-CV-3268 (GK) (D.D.C.); *Stevens v. Delta Air Lines, Inc.*, No. 99-CV-3368 (RWR) (D.D.C.).

treaty, "we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France v. Saks*, 470 U.S. at 396; *see also Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991). The court of appeals' singleminded insistence on its purported "plain language" construction conflicts with this important principle of treaty interpretation and overlooks patent ambiguities in the relevant text.

Finally, the wooden approach and arbitrary result mandated by the court below is impossible to reconcile with this Court's description of the underlying purposes of the Warsaw Convention. As this Court observed in *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), "[t]he Convention's first and most obvious purpose was to set some limit on a carrier's liability for lost cargo," and "[t]he Convention's second objective was to set a stable, predictable, and internationally uniform limit that would encourage the growth of a fledgling industry." *Id.* at 256. Numerous courts have recognized that "[i]n order to further the goals of uniformity and liability limitation, the Convention's provisions must be construed broadly. Indeed, the purposes of the Convention must be furthered 'to the greatest extent possible, even if that entails rejecting a literal reading' of the Convention." *Onyeanusi v. Pan Am*, 952 F.2d 788, 793 (3d Cir. 1992) (citations omitted); *accord, e.g., Benjamins v. British European Airways*, 572 F.2d 913, 918 (2d Cir. 1978); *Feeney*, 948 P.2d at 112.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 24, 2000

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 9, 1999 - Decided October 12, 1999

No. 98-7186

Maria V. Cruz, for herself and as representative of Gustavo Cruz and Joaquin Rodriguez, minors, et al.,
Appellants

v.

American Airlines, Inc.,

Appellee

Consolidated with

98-7187

Appeals from the United States District Court for the District of Columbia

(No. 96cv02817)

(No. 97cv02883)

Leonard N. Bebchick argued the cause and filed the briefs for appellants.

Carroll E. Dubuc argued the cause for appellee. With him on the brief was John E. Gagliano.

Before: WALD, SILBERMAN, and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN. SILBERMAN, Circuit Judge: Appellants seek reversal of a decision of the district court limiting their recovery for lost luggage to the amount set forth in the Warsaw Convention, and dismissing their common law fraud and deceit claims. We vacate in part the district court's entry of judgment against appellants. We hold that American Airlines' failure to comply with the baggage weight notice provisions of the Convention precludes it from relying on the Convention's liability limitations, but that appellants' common law claims are preempted by the Warsaw Convention.

I.

On December 21, 1995, fourteen members of the Cruz family arrived at National Airport, having purchased tickets for travel on American Airlines from Washington through Miami and on to their ultimate destination of Santo Domingo. Prior to boarding, each family member checked two suitcases, and was issued a baggage claim stub for each piece of luggage. These claim stubs did not indicate the weight of the suitcases.

The next day, after a delay in Miami, the Cruzes arrived in Santo Domingo. Unfortunately, five of their suitcases did not. Informed that plane weight restrictions had forced American to leave behind some of the baggage originally checked on their Miami-Santo Domingo flight, the Cruzes were told that the five suitcases would be shipped to Santo Domingo on a flight later that day. Upon their return to the airport, however, the bags were still missing (why does this sound so familiar?). The Cruzes promptly filed a missing property report with American; they also profess to have filled out, at American's request, more detailed "Declarations of Lost Property" indicating the contents and estimated value of each lost suitcase. American claimed that it did not receive any Declarations from the Cruzes for over 40 days after the Cruzes lost their luggage, and denied the Cruz family's lost-luggage claims on the ground that they did

not comply with American's requirement, stated in its contract of carriage, that Declarations be filed within 30 days of the date of the loss of baggage (the "30-Day Rule").

The Cruzes sued American asserting a federal cause of action under the treaty popularly known as the Warsaw Convention,[1] which governs claims arising out of the international carriage of persons and property by air. They alleged that they had submitted the required Declarations within the 30 days prescribed by the contract of carriage. In any event, appellants argued, the 30-Day Rule itself had been unlawfully applied to them. It was not mentioned in the tariffs American is required by law to file with the Department of Transportation for its Caribbean flights, *see* 49 U.S.C. § 41504 (1997), and it was also, according to appellants, contrary to the express and exclusive lost-luggage provisions set forth in the Warsaw Convention. *See* Warsaw Convention Art. 26(2). Besides seeking the fair value of their lost luggage, the Cruzes sought a declaratory judgment that American's application of the 30-Day Rule was unlawful, and an injunction preventing American from applying the Rule to passengers on its Caribbean flights in the future. The Cruz family also invoked the district court's supplemental jurisdiction to assert claims for damages against American for fraud and deceit under Maryland law, alleging that American had a practice of intentionally misapplying the 30-Day Rule against international passengers to discourage lost-luggage claims.

Conceding for the purposes of litigation that it had both lost the Cruzes' luggage and improperly denied

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[1] *See* Convention for the Unification of Certain Rules Relating to International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, note following 49 U.S.C. § 40105 (1997).

their lost luggage claim, American moved to dismiss all of appellants' claims in excess of the compensation provisions set forth in Article 22(2) of the Warsaw Convention, which limits air carrier liability to $9.07 per pound of luggage lost or damaged in the course of air transportation. The Cruzes responded that American's failure to state the weight of each suitcase on the baggage stubs, as required by Article 4(3)(f) of the Convention, precluded American from relying on the Convention's liability limitations. The district court ruled in favor of American and limited appellants' recovery to $9.07 per pound, using the default "deemed weight" set forth in American's tariffs to calculate damages when the weight of a suitcase was disputed or not known. *See Cruz v. American Airlines, Inc.*, Civil Action No. 96-02817, Mem. Op. at 16-17 (D.D.C. Oct. 24, 1997). The court held that, as American's concessions resolved appellants' lost-luggage claims, the Cruzes no longer had standing to challenge American's alleged misapplication of the 30-Day Rule, *see id.* at 25-26, and that appellants' common law claims were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1997). *See id.* at 35. After filing a motion for reconsideration and pursuing other procedural avenues in the district court including filing a separate class action raising similar substantive claims[2] the Cruzes appealed.

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[2] This appeal actually consolidates two cases. Both cases—a civil suit filed by five members of the Cruz family and a class action subsequently filed by the same named plaintiffs—arise out of the same set of facts and raise essentially identical substantive issues. Appellants had moved to amend their complaint as a class action and that motion was pending when American moved for summary judgment; because it ruled in favor of American at summary judgment, the district court dismissed appellants' motion to amend as moot. The Cruzes filed a separate class action (identical to their

[Footnote continued on next page]

II.

As noted, the Cruzes seek relief under the Warsaw Convention, which governs claims arising from international air transportation. The primary issue in this case is simply whether American's liability for losing the Cruzes' baggage is limited by Article 22(b) of the Treaty to $9.07 a pound. Appellants argue no; American did not comply with that Article because the Treaty's liability limitation is conditioned on a carrier's compliance with Article 4(4) which states that:

> if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at [Article 4(3)](d), (f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability. (Emphasis added.)

Article 4(3)(f) requires carriers to include the "number and weight of the packages" on its luggage tickets. It is undisputed that American did not do so. Appellants therefore contend that American has lost its Warsaw Convention damage limitation and that they are entitled to recover the full value of the luggage.

[Footnote continued from previous page]
motion to amend that was deemed moot by the district court), the ultimate dismissal of which was largely predicated upon the district court's substantive rulings in the original suit. Since we vacate the district court's summary judgment order in the original suit, appellants' complaint is restored to its prior status, with their motion to amend their complaint as a class action still pending before the district court. Accordingly, we need not address appellants' procedural objections to the district court's disposition of the two cases after it ruled against the Cruzes at summary judgment.

The district court accepted American's argument that Article 4(4) does not oblige a carrier to comply with all the "particulars" of (d), (f), and (h) of that Article; a carrier loses its liability limitation protection only if it complies with none of the particulars. While acknowledging that "no other courts" shared in its reading of Article 4(4), Mem. Op. at 11, the district court reasoned as follows:

> Article 4(4) directs that "if the baggage check does not contain the particulars set out at (d), (f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability." The Court notes that the provision employs the conjunction "and" rather than "or." In the ordinary case, the word "and" should retain its conjunctive meaning. . . . Considering the conjunctive meaning of the word "and," the plain language of this provision directs that liability is lifted only if all three "particulars" are missing.

Id. at 10-11 (emphasis in district court's opinion) (citations omitted). As the disputed luggage tickets contained two of the three "particulars," the district court concluded that American's failure to record the weight of each suitcase did not preclude the carrier's recourse to the Convention's liability limits. *Id.* at 11.

We do not agree. Although we recognize that the district court's interpretation is linguistically possible, we do not think it is a reasonable construction. It is rather clear to us that the word "and" means that Article 4(4) of the Convention obliges a carrier to comply with each of the three particulars.

American claims that appellants were hardly prejudiced by its failure to weigh the pieces of baggage and record the specific weights on the baggage tags because

its practice was to weigh (and charge extra) only for bags that exceed 100 pounds.[3] All bags on which no extra charge is imposed are deemed to weigh 100 pounds. That is simply another way of arguing that Article 4(3)(f)'s requirement makes little real sense. There is no apparent purpose in the requirement that the carrier actually weigh each bag and record the weight on the ticket, so long as a carrier's deemed-weight rules favor its passengers. Still the language of the Convention is unyielding and we have no warrant to dispense with portions we might think purposeless. As the Supreme Court has noted in its interpretations of the Warsaw Convention, "where the text is clear, we have no power to insert an amendment." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). We therefore reject the reasoning employed in *Martin v. Pan American World Airways, Inc.*, 563 F. Supp. 135 (D.D.C. 1983), relied upon by American and discussed at length by the district court. Mem. Op. at 8, 12-15. In that case, as well as ours, a default "deemed weight" was established in the airline's tariffs to "provide[ ] an alternative means of fixing the amount of liability," and the Martins (like the Cruzes) were made aware of the liability limitations of the Convention and the availability of additional insurance. *Id.* at 140; Mem. Op. at 15. The *Martin* court, explicitly eschewing what it believed to be the "literal reading" of Article 4(4) and looking instead to the Warsaw Convention's "primary purpose" of limiting air carrier liability, held that an "airline's failure to record the weight of [a passenger's] luggage is a technical and in-

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[3] The amount of American's default "deemed weight" was initially disputed in the district court, with American claiming that the deemed weight was 70 pounds and the Cruzes alleging that it was 100. At least for the purposes of the Cruzes' suit, American has conceded that it has a 100-pound deemed-weight rule.

substantial omission . . . which should not act to extend the airline's liability." *Martin*, 563 F. Supp. at 139, 141. But calling the requirement technical does not reduce its obligatory force if a carrier wishes to assert the Convention's liability limitations.

American, trying another tack, argues that the need for "uniformity" in construing treaties authorizes us to ignore the requirements of Article 4(4). To be sure, several courts have done so, *see, e.g., Republic Nat'l Bank of New York v. Eastern Airlines, Inc.*, 815 F.2d 232, 238 (2d Cir. 1987); *Abbaa v. Pan Am. World Airways, Inc.*, 673 F. Supp. 991, 992-94 (D. Minn. 1987), although since others have not, *see, e.g., Spanner v. United Airlines, Inc.*, 177 F.3d 1173, 1175-76 (9th Cir. 1999); *Tchokponhove v. Air Afrique*, 953 F. Supp. 79 (S.D.N.Y. 1996); *Da Rosa v. TAP Air Portugal*, 796 F. Supp. 1508, 1509-10 (S.D. Fla. 1992); *Gill v. Lufthansa German Airlines*, 620 F. Supp. 1453, 1456 (E.D.N.Y. 1985); *Maghsoudi v. Pan Am. World Airways, Inc.*, 470 F. Supp. 1275, 1278-80 (D. Haw. 1979), it could of course just as easily be argued that uniformity would be served by accepting the Cruzes' position. But even had all federal courts that had considered the issue decided that they had the authority to ignore the Treaty's language, we would not have joined them. If there are circuit conflicts, it is for the Supreme Court to supply uniformity. Nor are we the least bit impressed by American's claim that the subsequent amendment to the Convention by Montreal Protocol No. 4,[4] which entered into force on March 3, 1999, and which eliminated the baggage-

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[4] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, signed at Warsaw on October 12, 1929, as amended by the Protocol Done at the Hague on September 8, 1955, reprinted in S. Rep. No. 105-20, pp. 21-32 (1998).

weight requirement implicated in this case, should be read as "clarifying" the Convention's prior language. Montreal Protocol 4's luggage ticket provisions clearly amend prior law; as such they cannot possibly be given retroactive effect by being labeled a "clarification."

We therefore hold that the district court's interpretation of Article 4(4) was in error, and that American's failure to satisfy the Convention's baggage weight notice provisions precludes it from recourse to the $9.07 per pound limit provided in Article 22(2). Assuming American continues to concede liability on remand, appellants will be entitled to recover for the actual value of their lost luggage.

III.

The Cruzes also appeal the district court's dismissal of their fraud and deceit claims under Maryland common law. The district court threw out those claims on the ground that they were preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1). However, American raises an alternative argument that the Warsaw Convention itself provides the exclusive cause of action for injury arising out of a loss of luggage during international travel. We agree with American's alternative argument, so we need not grapple with what we regard as the more difficult issue of Airline Deregulation Act preemption.

The Warsaw Convention's preemptive impact is much more apparent after the Supreme Court's decision earlier this year in *El Al Israel Airlines, Ltd. v. Tseng*, 119 S. Ct. 662 (1999). Prior to that opinion, there was considerable dispute in the federal courts as to whether the Warsaw Convention which until 20 years ago was not even understood to create a cause of action, *see In re Korean Air Lines Disaster*, 932 F.2d 1475, 1491-92 (D.C. Cir. 1991) (Mikva, J., dissenting) had a preemptive impact on state law. At one point we declined to

take sides on the issue, *see id.* at 1488, but the Supreme Court has mooted our decorous position.

In *Tseng*, a passenger brought a claim under New York tort law after being subjected to an intrusive pre-boarding security search, alleging that the search caused her emotional and psychological injuries. *See Tseng*, 119 S. Ct. at 667. The Court held that the passenger's claim was preempted, and that recovery for a personal injury sustained in the course of international air travel, "if not allowed under the Convention, is not available at all." *Id.* at 668. The Court relied on Article 24 which provides that, "[i]n cases covered by" Article 17 (the Convention provision governing airline liability for personal injury claims), Article 18 (provision for lost or damaged luggage), and Article 19 (provision for damages caused by delay of passengers or luggage), "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."[5] The Court explained that Article 24 precludes "a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy Article 17's liability conditions," *id.* at 671 (emphasis added). It is clear, then, that the Con-

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[5] As alluded to above, Article 24 has also recently been modified by Montreal Protocol No. 4, and now states in relevant part that, "[i]n the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention." The Supreme Court has indicated that this modification "merely clarifies, it does not alter, the Convention's rule of exclusivity." *Tseng*, 119 S. Ct. at 674. While for the purposes of our analysis we examine the "[i]n cases covered . . . by Article 18" language contained in Article 24 at the time of appellants' claim, we see no reason that the modifications to Article 24 would require a different conclusion.

vention also provides the exclusive cause of action in cases "covered by" Article 18. There is still the question whether Article 18 "covers" appellants' fraud and deceit claims against American. Article 18 of the Convention establishes air carrier liability for damage "sustained in the event of the destruction or loss of . . . any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." Appellants contend that the "occurrence which caused the damage" they sustained was not the loss of their luggage, but American's fraudulent denial of their lost-luggage claim. In other words, the Cruzes argue that the existence of an intervening event the intentional misapplication of the 30-Day Rule to their claims subsequent to the loss of their luggage brings their common law claims outside of the Warsaw Convention's area of applicability entirely. *See Tseng*, 119 S. Ct. at 673 ("The Convention's preemptive effect on local law extends no further than the Convention's own substantive scope.").

Here again, *Tseng* is instructive. Article 17, which the Court held preempted *Tseng's* state law claims, establishes air carrier liability for "damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." *Tseng* did not suffer a "bodily injury" under Article 17; nor was the event that gave rise to Tseng's claim an "accident" as that term has been construed by prior cases. *See id.* at 667. Nonetheless, the Court held Tseng's claims to fall within the "substantive scope" of Article 17, and thus were preempted. *See id.* at 667-68. By analogy we think that the "substantive scope" of Article 18 must extend at least as far as to encompass the Cruzes' common law claims. The relationship between the occurrence that the Cruzes claim "caused" their injuries (the misapplication of the 30-Day Rule) is so closely related to the loss of the lug-

gage itself as to be, in a sense, indistinguishable from it. If American had simply asserted no reason for denying the Cruzes' lost-luggage claim, and just refused to pay, it is clear that the Cruzes' only remedy would be to sue under the Convention; they would not be able to fashion an additional state cause of action for malice or stubbornness. It follows, we think, that a bad reason for refusing to pay whether based on an unenforceable rule or not does not alter the legal situation. To be sure, if American's agent had hit Cruz with a baseball bat when rejecting Cruz's claim we would not think Cruz's tort claim would be preempted by the Warsaw Convention. Perhaps even a slanderous statement uttered by an American employee in a heated argument over lost luggage would be actionable. But were we to permit the Cruzes' "fraud and deceit" claims to proceed we would tear an obvious hole in the Convention's exclusivity for creative lawyers to exploit a construction of the Convention that the Supreme Court has made clear is to be disfavored. *See id.* at 672.

We are left with appellants' claims for declaratory and injunctive relief, which also are based on American's alleged misapplication of the 30-Day Rule. The district court dismissed these claims on jurisdictional grounds; because American conceded that it had misapplied the 30-Day Rule, and there was little risk of American once again misplacing the Cruzes' luggage, appellants lacked standing to assert a challenge to the Rule. Mem. Op. at 23-26. It also is quite possible that appellants' claims for declaratory and injunctive relief are moot, as American professes to have corrected its erroneous application of the 30-Day Rule to its Caribbean flights. Still, in the event that our remand of the district court's grant of summary judgment breathes life into the Cruzes' claims for declaratory and injunctive relief, we briefly address American's argument that these claims are also preempted by the Warsaw Convention.

American attempts to frame this issue in its favor by depicting the Cruzes' claims for declaratory and injunctive relief as based on state law. However while we agree that appellants' complaint is hardly a model of precise pleading these claims appear to be founded not on local law but on the Warsaw Convention itself; appellants allege that American's application of the 30-Day Rule was in violation of the Convention's express lost-luggage claim notice provisions. See War-saw Convention Art. 26(2). Furthermore, even if appellants' claims were made under state law, the Convention preempts only "any action for damages, however founded." Warsaw Convention Art. 24. Accordingly, we conclude that this claim, unlike the Cruzes' common law claims, is not preempted by the Warsaw Convention.

* * * *

We vacate the district court's entry of judgment against appellants in the Cruz family's original suit (No. 98-7186), and remand for proceedings consistent with this opinion. As our order reinstates the Cruzes' complaint to its status at the time of the district court's grant of American's motion for summary judgment, appellants' motion to amend their complaint as a class action remains pending before the district court.[6] We also va-

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[6] The Cruzes argue that the district court's denial of their motion to amend its complaint as a class action prejudiced unnamed class claimants whose claims expired under the Warsaw Convention statute of limitations during the six-month period between the filing of the motion to amend and appellants' subsequent filing of a class action. However, because appellants' motion to amend remains before the court, the statute of limitations has tolled from the date of filing with respect to the prospective class. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551-52 (1974).

cate the district court's dismissal of appellants' class action (No. 98-7187), but note that this claim is essentially duplicative of appellants' pending motion to amend, and that consolidation of these two cases by the district court would appear appropriate.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA V. CRUZ, et al.,

Plaintiff,

v.

Civil Action No.
96-02817
(CKK)

AMERICAN AIRLINES,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motion for Partial Summary Judgment, the Plaintiffs' Opposition, and the Defendant's Reply. The Plaintiffs' claims arise out of the loss of their luggage during an international flight and the processing of their claims for the loss of that luggage. They have filed a complaint seeking compensatory and punitive damages, and declaratory and injunctive relief. The Defendant has moved for partial summary judgment, relying on the Warsaw Convention, the Airline Deregulation Act of 1978, and the theory of primary jurisdiction. On September 15, 1997, the Court held a hearing on the Defendant's Motion for Partial Summary Judgment. Upon consideration of pleadings, the arguments at the hearing, the entire record herein, and the relevant law, the Court will grant the Defendant's Motion for Partial Summary Judgment as to Claim I, will dismiss Claim II, and will grant Summary Judgment as to Claim III.

FACTUAL BACKGROUND

The following undisputed material facts are deduced from the Plaintiffs' Amended Complaint ("Complaint"), the Defendant's Answer to Amended Complaint ("Answer"), the Defendant's Rule 108(h) statement of undisputed materials facts ("Rule 108(h)"), and the Defendant's Motion for Partial Summary Judgment ("Deft.'s Mot. for Partial Summ. J."). On December 21, 1995, Plaintiffs Maria V. Cruz, Gustavo Cruz, Joaquin Rodriguez, Beato Cruz, and Yovary Polanco[1] checked their luggage with Defendant American Airlines and received baggage claim stubs for each piece of luggage. (Complaint ¶ 4; Answer ¶ 4; Rule 108(h) ¶ 1). The Defendant weighed approximately half of the bags that the Plaintiffs tendered to the Defendant, (Complaint ¶ 4; Rule 108(h) ¶ 4), and because some of the luggage was overweight, Maria Cruz paid $135.00 in overweight charges. (Complaint ¶ 4; Rule 108(h) ¶ 5; Deft.'s Mot. for Partial Summ. J. at 5-6 & n.4, 9). The baggage claim stubs did not state the weight of the bags. (Complaint ¶ 4; Rule 108(h) ¶ 5).

On December 22, 1995, when the Plaintiffs arrived at their destination of Santo Domingo, they discovered that five pieces of their luggage had not been delivered. (Complaint ¶¶ 5,6; Answer ¶¶ 4, 5; Rule 108(h) ¶ 7). That same day, they filled out and submitted to the Defendant a missing property report. (Complaint ¶ 6; Plaintiffs' Missing Property Report in Deft.'s Mot. for Partial Summ. J., Attachment III; Rule 108(h) ¶ 8). One bag was returned eventually, although it was damaged and empty. (Complaint ¶ 6; Answer ¶¶ 4,5; Rule 108(h)

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[1] Both Gustavo Cruz and Joaquin Rodriquez are minors, and Maria Cruz brings the action on their behalf. Similarly, Yovary Polanco is a minor, and Sandra Maria Cruz brings this action on his behalf.

¶¶ 2, 7). As to three of the lost pieces of luggage, the Plaintiffs paid excess weight fees. (Plaintiffs' Declaration of Lost Property in Deft.'s Mot. for Partial Summ. J., Attachment III; Deft.'s Mot. for Partial Summ. J. at 5 n. 4, 9).[2]

Thereafter, the Defendant rejected the Plaintiffs' lost luggage claims because the Plaintiffs did not file the declaration of lost property within 30 days of their loss. (Complaint ¶ 9; Answer ¶ 7; Rule 108(h) ¶ 12). This 30 day limitation for filing a written claim is encompassed in Condition 12 of the Defendant's Conditions of Carriage ("Condition 12"). *See* Ex. A of Plaintiffs' Requested Submission.

The Plaintiffs filed a Complaint, and then an Amended Complaint, seeking damages for the value of the luggage that they allege the Defendant lost during their international flight. They also seek a declaratory judgment that the Defendant unlawfully applied Condition 12 and unlawfully required the Plaintiffs to complete a declaration of lost property,[3] and they seek to en-

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[2] Plaintiffs claim that after filing the missing property report on December 22, 1995, they also filed a declaration of lost property on January 9, 1996, January 26, 1996, and February 7, 1996. The Defendant admits only that the Plaintiffs filed a declaration on or about February 7, 1996. *See* Answer at ¶ 7. The dispute about whether or not the Plaintiffs filed declarations on January 9, 1996 and January 26, 1996, is not material in light of the Court's ruling with respect to Claims II and III, and is irrelevant as to Claim I because the Defendant has accepted the claims for lost luggage based on the missing property report that the Plaintiffs filed on or about December 22, 1995.

[3] The parties explained to the Court at the hearing that a declaration of lost property is a detailed claim form, whereas a missing property report does not require such specificity.

join the Defendant from "publishing, applying or enforcing such rules in foreign air transportation." Finally, the Plaintiffs request compensatory and punitive damages for fraud and deceit, which they claim the Defendant committed when applying Condition 12 to their lost baggage claims.

DISCUSSION

Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 (c). The movant bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thereafter, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" 477 U.S. at 324.

In deciding a motion for summary judgment, the court must believe all of the evidence produced by the non-movant, and must draw all favorable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 255, 255 (1986). Ultimately, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251.

CLAIM I

In Claim I, the Plaintiffs seek to recover the value of the contents of their lost luggage. As to this claim, the Defendant moves for partial summary judgment as to all claims that are in excess of the limitation of liability set forth in Article 22(2) of the Warsaw Convention. The Defendant argues that the Plaintiffs are not entitled to recover the value of their luggage because Article 22(2) of the Warsaw Convention (Convention)[4] limits their recovery to $ 9.07 per pound of their checked luggage.

The Warsaw Convention "appl[ies] to all international transportation of persons, baggage, or goods performed by aircraft for hire." Article 1. Article 4 of the Convention sets forth particulars that must be included on a baggage check when a passenger checks baggage with a carrier. One such particular is the number and weight of the packages. *See* Article 4(2) (f). Subsection (4) of Article 4 provides that "if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d),[5] (f),[6] and (h)[7] above, the carrier shall not be entitled to avail himself of those provisions of the convention that exclude or limit his liability." Article 22(2)

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[4] Convention for the Unification Of Certain Rule Relating to International Transportation By Air With Additional Protocol, Oct. 12, 1929, 49 U.S. Stat. 3000, T.S. 876 (1934), *reprinted in* 49 U.S.C. App. § 1502 note (commonly known as "Warsaw Convention").

[5] "The number of the passenger ticket." Article 4(2)(d).

[6] "The number and weight of the packages." Article 4(2)(f).

[7] "A statement that the transportation is subject to the rules relating to liability established by this convention." Article 4(2)(h).

of the Convention establishes one such limitation on the liability of the carrier:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram [or $9.07 per pound), unless the consignor has made at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the actual value to the consignor at delivery.

Article 22 (2).

The plaintiffs' position is that because the Defendant failed to include the weight of their luggage on their baggage claim stubs as required in Article 4 (2) (f), the Defendant is precluded by Article 4(4) from availing itself of the limited liability provision in Article 22 (2). In support of this claim, the Plaintiffs rely on several decisions from courts outside this circuit that have held that a carrier is not entitled to limited liability if the weight is not included on the baggage check stub. *See e.g. Da Rosa v. Tap Air Portugal,* 796 F. Supp. 1508 (S.D. Fla. 1992); *Vekris v. People's Express Airlines,* 707 F. Supp. 675 (S.D.N.Y. 1988); *Gill v. Lufthansa German Airlines,* 620 F. Supp. 1453, 1455-56 (S.D.N.Y. 1985).

The Defendant, in opposition, relies largely on *Martin v. Pan American World Airways,* 563 F. Supp. 135 (D.D.C. 1983), in which Judge Thomas A. Flannery held that the omission of the weight from the baggage check did not lift the limited liability in Article 22(2). 563 F. Supp. at 140-41. Specifically, *Martin* held that "the failure to record the weight of [the] luggage is a techni-

cal and insubstantial omission." *Martin,* 563 F. Supp. at 141; *see also Republic National Bank of New York v. Eastern Airlines,* 815 F.2d 232 (2d Cir. 1987); *Abba v. Pan American World Airways,* 673 F. Supp. 991 (D. Minn. 1987).[8]

The Plaintiffs argue that the Supreme Court decision in *Chan v. Korean Air Lines, Ltd.,* 109 S. Ct. 1676 (1989) rejected the *Martin* rationale. In *Chan,* the Court interpreted Article 3(2) of the Warsaw Convention, which provides that if a carrier fails to deliver a ticket to a passenger, then the carrier is not able to avail itself of the limited liability provisions in the Convention. *Id.* at 1679. The *Chan* Court considered whether the carrier would be precluded from availing itself of the limited liability provisions where the ticket is delivered, but one of the particulars in the ticket is irregular. Applying the clear language of Article 3(2), the Court found no basis in the provision for holding that the irregularity of a particular in the ticket could preclude limited liability. The Court held that "where the text is clear . . . we have no power to insert an amendment." *Id.* at 1683 (footnote

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[8] The Defendant also cites cases that interpret Articles 8 and 9 of the Convention. *See Brinks v. South African Airways,* 93 F.2d 1022 (2d Cir. 1996); *Exim v. Pan American,* 754 F.2d 106 (2d Cir. 1985); *Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.,* 976 F.2d 90 (2d Cir. 1992). Article 8, like Article 4, requires certain particulars to be included in a waybill. See Article 8. Article 9 precludes limited liability if certain particulars are omitted from the waybill. *See* Article 9. The cases cited by the Defendant hold that the omission of certain particulars set out in Article 8 will not preclude the limited liability unless the particular has "practical significance." *See Exim v. Pan American,* 754 F.2d 106 (2d Cir. 1985); *see also Brinks v. South African Airways,* 93 F.2d 1022 (2d Cir. 1996); *Distribuidora Dimsa v. Linea Aerea Del Cobre S.A.,* 976 F.2d 90 (2d Cir. 1992).

omitted). The Court therefore declined to undertake an interpretative analysis of the language. The Plaintiffs argue that in light of *Chan's* disapproval of the interpretive approach in cases where the language is clear and unambiguous, the *Martin* decision is incorrect because Martin did not apply the clear, unambiguous text of Article 4(4), which according to the Plaintiffs, precludes limited liability if the weight is omitted. The Plaintiffs therefore urge this Court to reject *Martin* by following the plain meaning of Article 4, and thus to find that liability is not limited under Article 22 (2).

This Court agrees that *Chan* held:

> "[w]e must thus be governed by the text -- solemnly adopted by the governments of many separate nations -- whatever conclusion might be drawn from the intricate drafting history [of the Convention]. The latter may of course be consulted to elucidate a text that is ambiguous. . . . But where the text is clear . . . we have no power to insert an amendment."

Id. Accordingly, the Court's analysis must begin by determining whether Article 4(4) is clear or ambiguous. Article 4(4) directs that "if the baggage check does not contain the particulars set out at (d), (f), *and* (h) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability." Article 4(4) (emphasis added). The Court notes that the provision employs the conjunction "and" rather than "or." In the ordinary case, the word "and" should retain its conjunctive meaning, and because the words "or" and "and" are not generally interchangeable, the word "and" may be construed as "or" only in rare circumstances. *See Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 890 n.79 (D.C. Cir. 1987). Considering the conjunctive meaning of the word "and", the plain language of this provision directs that liability is lifted only if all three

particulars are missing. Thus, the Court concludes that the Defendant is entitled to avail itself of the limited liability in Article 22(2) because only one of the particulars, namely the weight, was missing from the baggage claim stub.

Alternatively, the Court notes that it appears that no other courts have read Article 4(4) in the conjunctive. Rather, all Courts appear to have construed the language as disjunctive. Given this fact, the Court recognizes that the language in Article 4(4) may not be unambiguous. Where the language of the text is ambiguous, "the plain meaning rule does not apply and [the Court] is free to employ traditional interpretive methods." *Maritime Insurance Co. Limited v. Emery Air Freight Corp.*, 983 F.2d 437, 440 (2d Cir. 1993).

In determining whether the absence of the weight alone on the claim stub should prevent the Defendant from availing itself of the limited liability provisions, the Court is guided by Judge Flannery's considerations in *Martin* regarding the two-fold purpose of the weight requirements. The first purpose is "to fix the amount of liability if the baggage is lost, and to afford a definite basis for passengers to recover damages." *Martin,* 563, F. Supp. at 140. The second purpose is to "ensure that a passenger is aware of the weight of the baggage, so that she may determine whether she should purchase additional insurance." *Id.*

The first purpose of the weight requirement is met in this case notwithstanding the absence of the weight on the baggage claim stub. The Defendant's tariff fixes the weight at the maximum allowable free weight (70 pounds) if the weight is not indicated. *See* Ex.. 1 to Attachment V of Def. Mot. for Partial Summ. J., Tariff AA-66. Thus, the Plaintiffs have a fixed basis for recovery, and the Defendant has a fixed amount of liability.

The Plaintiffs argue that the Defendant may not rely on the "maximum free weight allowance" tariff because it is contrary to Article 4(4) provision that precludes the carrier from limiting its liability to $9.07 per pound if weight is missing from the baggage check. The Convention provides only that the liability is limited to $9.07 per pound, and does not indicate how the weight is to be determined. The maximum free weight allowance tariff does not act to limit the $9.07 per pound liability as provided in the Convention; rather it only provides a fixed weight in the event that the baggage check does not indicate the weight of the baggage. This tariff "supplements Convention Article 4, and represents an appropriate accommodation of the need to preserve limited liability for property damage, and the need to ensure some means of fixing the amount of liability." *Martin,* 563 F. Supp. at 140; *see also Thompson v. British Airways,* 1989 WL 43997, *3 (D.D.C. April 18, 1989) (finding that the maximum allowable weight tariff does not conflict with a provision of the Convention, and following *Martin's* conclusion that the tariff supplements the Convention and is consistent with the purpose of the convention).

The Court also finds that the failure to provide the weight in the instant case does not frustrate the second purpose weight requirement. The Plaintiffs in the instant case allege that the value of each lost bag was approximately $5,000. The Plaintiffs knew the value of the contents of the bags, and knew that if the weight was not indicated on the luggage, then each bag is deemed to weigh 70 pounds. The plaintiffs claim that they paid $135.00 in excess baggage fees for their lost luggage. The Defendant has accepted this fact. *See* Deft.'s Mot. for Partial Summ. J. at 5 n.4. The Defendant's Tariff, AA-110-E, provides that where a bag is overweight by 35 pounds or less, the passenger must pay $35.00. For a bag 35 to 70 pounds overweight, the passenger must pay $50.00. Plaintiffs argue that they paid $135.00 in excess weight fees. Thus it follows that one of the Plaintiffs

bags was overweight by at most 35 pounds, and two bags were overweight by at most 50 pounds each. The Defendant does not dispute these facts. *See* Deft.'s Mot. for Partial Summ. J. at 9 ("For purposes of this Motion, Defendant American is also adding 35 pounds for one bag and 70 pounds for each of the other two bags plaintiff alleges were weighed and for which they paid $135. . . ."

Given that three bags were weighed, and the Plaintiffs were charged excess baggage fees, Plaintiffs were on notice that as to three of the lost pieces of luggage, their recovery would be limited to $9.07 per pound at 105 pounds for one bag; and to $9.07 per pound at 140 pounds for two bags. Furthermore, they were on notice that if their baggage check did not include a weight, the bag is deemed to weigh 70 pounds. Therefore, Plaintiffs had sufficient information to "make a rational decision concerning [the] need of insurance." *Martin*, 563 F. Supp. 140. The Plaintiffs should have realized that in order to recover approximately $5,000 per bag, their bags would have to weigh approximately 333 pounds each. Thus, it is obvious that the plaintiffs should have known that despite the absence of the weight notation, their recovery would have been "far less than the value of the contents of the lost luggage." *Id.* at 141; *see also Republic National Bank of New York v. Eastern Airlines, Inc.*, 815 F.2d 232 (2d Cir. 1987) ("A passenger need only multiply the amount recoverable per pound under the Convention ($9.07) by the weight of his baggage to arrive at [the amount of their recovery]."). The Plaintiffs had sufficient notice and opportunity to make an informed decision about whether to purchase additional insurance, so that the second purpose of the weight requirement was not undermined. *Id.*

The Court finds that the failure of the Defendant to include the weight of the luggage on the baggage stub does not prejudice the plaintiffs. Thus, as to whether the absence of the weight alone should act to preclude the

Defendant from the limited liability, the Court finds that the purpose of the weight requirement coupled with the facts of this case dictate that the Defendant is entitled to avail themselves of the limited liability in Article 22 (2).

The Warsaw Convention's limitations of liability apply in this case because the language in Article 4 (h) unambiguously precludes liability only if all three specified particulars are missing from the baggage check. Alternatively, the absence of the weight from the baggage check in this case did not prejudice the Plaintiffs because the absence did not frustrate the purpose of the weight particular. Therefore, the Defendant's Motion for Partial Summary Judgment is granted.

An additional issue must be addressed. The Defendant does not dispute that four pieces of luggage were not delivered to the Plaintiffs, and that one additional piece of luggage, which initially was not missing, eventually was returned damaged and empty. *See* Deft.'s Mot. for Partial Summ. J. at 5 n. 4. The Defendant does not dispute that two pieces of the luggage at issue weighed approximately 140 pounds each, and that one piece weighed approximately 105 pounds. *Id.* at 9. Furthermore, the Defendant does not dispute that Plaintiff Maria Cruz paid $135 in excess baggage fees for that luggage. *Id.* at 5 n. 4.

In its Motion, however, the Defendant claims that the Plaintiffs should be required to "prove the value and specific loss of property for all claims less than the limitation of liability under the Warsaw Convention." *See* Deft.'s Mot. for Partial Summ. J. at 6. In addition, the Defendant states that "plaintiffs should be required to prove the items of property loss with respect to any claim viable within the Warsaw Convention of limitation of liability." *Id.* at 7. Based on the fact that the Defendant has conceded both the number of missing/delayed pieces of luggage and the approximate weights thereof, and in light of the Court's foregoing conclusion that the weight of the luggage not the value

is the measure of recovery, the issue of the value of the contents of the luggage is irrelevant.

In the Court's opinion the material facts as to the Defendant's liability for the lost luggage are not in dispute. Notably, the Defendant admits that it checked the Plaintiffs' luggage; that five pieces were either never delivered or were delayed in delivery. Furthermore, it is either an undisputed and/or uncontested fact that two bags weighed 140 pounds each, one bag weighed 105 pounds, and two bags are deemed to weigh 70 pounds each. Based on these facts the Court would conclude that the Plaintiffs are entitled to judgment in the amount of $4, 761.75.[9]

At this time, however, neither party has filed a motion requesting final judgment. Thus, pursuant to an accompanying Order, the parties will have until October 30, 1997 to file additional dispositive motions; if none are filed within that time, then the parties shall appear before the Court for a status hearing on November 7, 1997, at 10:30 a.m.

CLAIM II

In claim II, the Plaintiffs allege that the Defendant unlawfully applied the Conditions governing lost baggage claims for domestic travel to the Plaintiffs' claims for lost baggage arising from international travel. Specifically, the Plaintiffs claim that the Defendant should not have required the Plaintiffs to complete a declaration of lost property, and should not have applied the 30 day rule in Condition 12 because these conditions apply only to domestic travel.

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[9] The total weight of the missing luggage is 525 pounds. Thus, at $9.07 per pound, the Plaintiffs would recover $4,761.75.

Furthermore, the Plaintiffs claim that the Defendant must publish in its tariffs, and give notice of, the rules and practices governing its performance of foreign air transport. The Plaintiffs conclude that the Defendant has violated this publication and notice requirement by applying the 30 day requirement in Condition 12 and the declaration requirement to international travel. The Plaintiffs seek a declaration that the application of Rule 12 to foreign travel is unlawful. Furthermore, the Plaintiffs seek a permanent injunction prohibiting the Defendant from "publishing, applying or enforcing such rules in foreign air transportation" because they claim that it conflicts with Article 26 of the Convention.

As to these claims, the Defendant proffered in its Motion to Dismiss several bases for summary judgment, namely that the claims are precluded by the Warsaw Convention or the theory of primary jurisdiction. At the time of the hearing, the Court sua sponte raised an issue about the viability of Claim II. Specifically, the Court, for the following reasons, asked the parties whether there was an issue to adjudicate in Claim II: the Defendant had conceded that it had misapplied Condition 12 and incorrectly required a detailed declaration before processing the claim;[10] the parties had agreed that the Warsaw Convention dictates the procedures for filing claims of lost luggage; and the Defendant had accepted the Plaintiffs' claims for lost luggage as properly filed.

At the hearing, the Defendant pursued the Court's approach on the issue of whether Claim II was justiciable, and argued that no justiciable issue existed any longer because the parties were in agreement that only the conditions of domestic travel require a detailed declaration of the loss. In essence, the Defendant argued

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[10] The parties did not provide the Court with the specific cite of this Condition.

that there was no present case or controversy. At the hearing, the Plaintiffs recognized that their own claims had been resolved, and acknowledged that the Defendant had conceded that the wrong rules were applied to the claims of the Plaintiffs. The Plaintiffs, however, focused on the issue of mootness, and argued that the case was not moot because it was capable of repetition. Counsel for the Plaintiffs argued that if the Plaintiffs' pending motion to amend the complaint to assert a class action was granted, then this claim clearly would present a justiciable controversy.[11] Upon consideration of the Amended Complaint, the Motions for Partial Summary Judgment, Opposition, and Reply, as well as the arguments made during the hearing on September 15, 1997, the Court finds that the Plaintiffs do not have standing to assert the claims for declaratory and injunctive relief.[12]

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[11] Following the hearing, the Defendant submitted a "Notice of Authorities," citing cases on the issues of whether the Plaintiffs could seek relief on behalf of third parties not before the Court and whether a justiciable controversy existed. The Plaintiffs then moved to strike the Notice of Authorities on the ground that it was filed out of time allowed in the Court's scheduling order, and because it raised new grounds for dismissal that were not raised in the Motion for Partial Summary Judgment. To the extent that the Plaintiffs assert in the Motion to Strike that they did not address this issue because it was not raised in the Defendant's Motion, the Court notes that the issue of case or controversy was raised sua sponte by the Court at the hearing. Nonetheless, given that the Court did not rely on the Notice of Authorities, the Court will grant the Motion to Strike.

[12] The Court notes that the Plaintiffs cannot be representatives of a class action if they do not have standing on their own to bring an action. *See American Jewish Congress v. Vance*, 575 F.2d 939, 944 (D.C. Cir. 1978) (noting that "actual plaintiffs must show that they have personally suffered

[Footnote continued on next page]

"The federal courts are powerless to decide any matter unless it involves a case or controversy." *Federal Express Corp. v. Air Line Pilots Ass'n,* 67 F.3d 961, 963 (D.C. Cir. 1995) (citing U.S. Const. art. III, § 2). The Declaratory Judgment Act likewise requires an actual case or controversy. *See* 28 U.S.C. §2201 (a). In determining whether an "actual case or controversy" exists, the courts apply the same standard for whether a case or controversy exists for Article III purposes. *See Federal Express Corp.,* 67 F.3d at 963 n. 2 ("The term 'actual' is, however, one of emphasis, and not indicative of a different standard from Article II as to what qualifies as a controversy.")

In order to have a case or controversy, and therefore to have standing, the Plaintiffs must "demonstrate a 'personal stake' in the outcome in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). This requires a plaintiff to show that he has "'sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not conjectural or hypothetical." *Lyons,* 369 U.S. at 102 (citations omitted).

A. Declaratory Judgment

Specifically with respect to a declaratory judgment, "there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present rights upon established facts.'" *Ashcroft v. Mattis,* 431 U.S. 171, 172 (1977) (quoting

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[Footnote continued from previous page]
an injury redressable by the courts (citing *Warth v. Seldin,* 422 U.S. 490, 502 (1975)).

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 242 (1937). There is no

> "precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Federal Express Corp., 67 F.3d at 964 (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

In the instant Motion for Summary Judgment, the Defendant admits that it incorrectly required the Plaintiffs to fill out a declaration, and incorrectly applied the 30 day rule to their claims. The Defendant has agreed to process the Plaintiffs claims as properly requested and timely filed. Thus, applying the standards for whether a case or controversy exists, the Court concludes that in this case as to whether the 30 day rule should have been applied to these Plaintiffs, there does not exist a "substantial controversy, between parties having adverse legal interests."

Furthermore, the argument that the Defendant may again lose the Plaintiffs' luggage while they are engaged in international travel on the Defendant's airlines, and that the Defendant again may misapply the rules of domestic travel to international travel fails to present a future injury that is of sufficient immediacy and reality to form a live case or controversy. *See Lyons,* 461 U.S. at 104 (holding that assertion that Plaintiff may be subject to illegal choke hold in the future was insufficient to create an actual case or controversy in order to enter a declaratory judgment); *O'Shea v. Littleton,* 414 U.S. 488, 497 (1974) (finding that the allegations of plain-

tiffs' future illegal conduct and prosecution thereof did not support court's jurisdiction); *Golden v. Zwickler,* 394 U.S. 103, 109 (1969) (holding that a finding of sufficient immediacy and reality was precluded by unlikelihood that former congressman, whom plaintiff wanted to criticize anonymously in handbill in violation of statute prohibiting distribution of statements in handbill about election of public officers, would be reelected). While the Plaintiffs may have standing to seek damages for misapplication of the 30 day rule, they do not have standing to seek a declaratory judgment as to the application of the 30 day rule. *See Lyons,* 461 U.S. at 109.

As noted above, the Plaintiffs have focused their argument on whether their claim is moot. Mootness, however, is not an issue where the Plaintiffs argument that their injury is capable of repetition is based purely on speculation. *See Lyons,* 461 U.S. at 109. The "capable-of-repetition doctrine applies only in the exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will be again subjected to the alleged illegality." *Lyons,* 461 U.S. at 109 (citing *Defunis v. Odegaard,* 416 U.S. 312, 319 (1974). Furthermore, the Plaintiffs' claims do not evade review because they have standing to pursue an action for compensatory damages. *Id.*

B. Injunctive Relief

Considerations about whether a case or controversy exists for Article III and Declaratory Judgment purposes "shade into those determining whether the complaint states a sound basis for equitable relief." *O'Shea,* 414 U.S. at 498. In order to be entitled to equitable relief, the Plaintiffs must establish irreparable harm and inadequacy of legal remedies. *See Sampson v. Murray,* 415 U.S. 61, 88 (1974). The Plaintiffs cannot meet the requirement of irreparable injury because they have failed to show any real or immediate threat that they will suffer the same injury. *Id.* at 111; *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.* 559 F.2d

841 (D.C. Cir. 1977). Furthermore, the Plaintiffs have an adequate legal remedy in that they have sought compensatory damages for the Defendant's actions. *Id.; see also Gemini Supply Corp. v. Zeitlin,* 590 F. Supp. 153, 159 (D.D.C. 1984) (denying injunctive relief where injury was compensable by monetary damages). Accordingly, the Court will dismiss Claim II pursuant to Fed. R. Civ. P. 12(b)l for a lack of subject matter jurisdiction.

CLAIM III

The Plaintiffs' final requested relief is for compensatory and punitive damages based on a claim of fraud and deceit. The Plaintiffs maintain that the Defendant has a willful and knowing practice and policy of rejecting claims for lost or damaged checked baggage in foreign air transportation where the claimant has not complied with Rule 12. The Plaintiffs allege that this practice and policy constitutes a breach of duty that is owed by a common carrier for hire under (1) common law; (2) the terms of the Warsaw Convention; and (3) federal law requiring publication of terms. The Plaintiffs further allege that the application of this practice was malicious, deceptive, and fraudulent, and seek $80,000 in compensatory damages and $75,000 in punitive damages.

It is the Defendant's position that the instant claim relates to a service of the airline. The Defendant argues that this claim therefore is preempted by the Airline Deregulation Act of 1978, which prohibits states from enacting or enforcing any law relating to an air carrier's rates, routes, or services.

In 1978, Congress enacted the Airline Deregulation Act (ADA), Pub L. No. 95-904, 92 Stat. 1705 (1978) (now codified at 49 U.S.C. § 40401 (1994)), which amended the Federal Aviation Act of 1958 (FAA), Pub. L. No. 85-726, 72 Stat. 731 (1958). Through the 1978 amendments, Congress sought to deregulate domestic air transportation. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). Congress believed that de-

regulation would encourage competition in the market, which most effectively would foster low prices, high quality, and increase the variety of services provided by airlines. *Id.* Out of concern that the States would attempt to "undo federal deregulation with regulation of their own," Congress included in the ADA a preemption provision. *Id.*; *see* 49 U.S.C. § 1305(a)(1) (1978) (now codified at 49 U.S.C. 41713(b)(1) (1994)). In 1994 Congress reenacted the ADA, and revised the preemption clause to read:

> [A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."

49 U.S.C. 41713(b) (1) (1994); *see also American Airlines, Inc. v. Wolens,* 513 U.S. 219, 223 (1995).

The question presented in the Defendant's Motion with respect to the third claim is whether an action for fraud and deceit arising out of the Defendant's handling of the Plaintiffs' lost baggage claims is "related to a price, route, or service of an air carrier." The Court concludes that this action is related to a service of the Defendant, and thus is preempted by the ADA.

Two Supreme Court decisions have considered the preemption clause of the ADA. *See Wolens,* 513 U.S. 219; *Morales,* 504 U.S. 381. In *Morales v. Trans World Airlines, Inc.,* the Supreme Court considered whether the ADA preempted state enforcement of guidelines governing the content and format of airline advertising, frequent flyer programs, and compensation for passengers whose seats were lost due to over booking because such guidelines related to the airlines rates. *Morales,* 504 U.S. at 385-89. The Court concluded that the guidelines did relate to airline rates. In so concluding, the Court broadly construed the phrase "related to." *Id.* at 383.

In *Wolens*, the Court considered whether the ADA preempted an action against the airline for a violation of

the Illinois Consumer Fraud and Deceptive Business Practice Act and for breach of contract. The Court held that the claim pursuant to the Illinois statute was pre-empted by the ADA because it "serves as a means to guide and police the marketing practices of the airlines." *Id.* In contrast, the Court found that the ADA did not preempt "state-law based court adjudication of routine breach of contract claims." *Id.* at 232. The Court stated that "the distinction between what the State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state law or policies external to the agreement." *Id.* at 233.

Morales and *Wolens* dictate that the Plaintiffs' claims are preempted only if the action is based on state law, not contract principles, and if the "action relate[s] to a route, rate, or service, either by expressly referring to them or by having a significant economic effect upon them." *See Chrissafis v. Continental Airlines,* 940 F. Supp. 1292, 1297 (N.D. Ill. 1996); *see also Travel All Over the World v. Saudi Arabia,* 73 F.3d 1423, 1432 (7th Cir. 1996). In the Opposition to the Motion for Partial Summary Judgment, the Plaintiffs specifically argue that the action is based on common law deceit. Thus, the Plaintiffs state not a breach of contract claim, but an action that derives from the enforcement of state tort law. *See Chrissafis,* 940 F. Supp. at 1298. Given that the Plaintiffs' claims are not contract claims, the most obvious basis for rejecting the Defendant's preemption argument does not exist. Accordingly, the Court must consider whether the claims relate to services as defined in *Morales* and *Wolens.*

In the cases relied upon by the Plaintiffs, the courts found that the challenged conduct does not relate to a service as defined in *Morales* and *Wolens.* In *Hodges v. Delta Airlines, Inc.* 44 F.3d 334, 338 (5th Cir. 1995), the court provided a definition of services:

> Services generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to deregulate as "services" and broadly to protect from state regulation.

Hodges v. Delta Airlines, 44 F.3d 334 (5th Cir. 1993) (en banc) (quoting *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 354 (5th Cir. 1993). The *Hodges* court held, however, that Congress did not intend to preempt personal injury claims that arise out of the negligent operation or maintenance of an aircraft given that the ADA requires airlines to carry insurance for bodily injuries or property damage arising out of the operation or maintenance of the aircraft. *Id.* at 338. The *Hodges* court concluded that the negligent storage of overhead baggage had no specific reference to airline services. *Id.* at 339-40. Furthermore, the court found that allowing the negligence claim to proceed would not significantly affect the airline's services. *Id.* at 340.

In *Gee v. Southwest Airlines*, 110 F.3d 1400, 1406 (9th Cir. 1997), the Ninth circuit distinguished between "emotional injury claims stemming from the 'negligent rendition of service' [and] safety-related personal injury or death claims concerning airline operations or mainte-

nance." *Id.* The *Gee* court concluded that claims for injuries from being hit with a serving cart were not preempted because they were not related to a service, but arose out of "the failure to take appropriate safety measures relating to the operation of the aircraft." *Id.* at 1407. Consequently, the *Gee* court held that injuries from baggage falling out of the overhead compartment arose from the safe operation of the flight, and therefore were not preempted. *Id. See also Wolens,* 513 U.S. at 231 n.7 ("American does not urge that the ADA preempts personal injury claims relating to airline operations").

Similarly, *Lathigra v. British Airways PLC,* 41 F.3d 535, 540 (9th Cir. 1994), held that the negligent reconfirmation of a connecting flight had "'too tenuous, remote, or peripheral' an effect on air carrier services for the [ADA] to preempt it." *Id.* (quoting *Morales,* 504 U.S. at 390); *see also Romano v. American Trans Air,* 56 Cal. Rptr. 2d 428, 432 (1996) (holding that negligence action for airline attendant's failure to restrain passenger from assaulting another passenger did not "intrude upon or affect the [] regulation of air fares and other rates, routes or services and was not preempted).

In the instant case, the Plaintiffs' claims do not arise out of the operation or maintenance of the aircraft. Thus, two of the cases that the Plaintiffs rely upon are inapposite to the instant case. *See Gee v. Southwest Airlines*, 110 F.3d 1400 (9th Cir. 1997) (finding that injury suffered by cart striking the plaintiff was not related to a service, but was "connected with the failure to take appropriate safety measures relating to the operation of the aircraft"); *Hodges v. Delta Airlines*, 44 F.3d 334 (5th Cir. 1995) (holding that negligent storage of baggage in overhead compartment derives from the operation of the aircraft, and therefore is not preempted).

Furthermore, the Plaintiffs' claims against the Defendant, unlike those in *Lathigra* and *Romano*, arise directly out of the bargained for services of providing

transportation of luggage. Passengers who travel on an airline and check luggage with the airline expect the airline to transport that luggage to the passengers' destinations. If the luggage does not arrive with the passenger, then the passenger expects that the airline will attempt to locate the luggage, thus fulfilling its obligation to transport the luggage. Requiring notice of the fact that one's luggage did not arrive is but the first step for the airline to meet its obligation to successfully and safely transport the passenger's luggage. Thus, a challenge to the notification requirements of the airline directly affects the airline's obligation and ability to provide the service of luggage transportation.

The Court concludes that the Plaintiffs' claims directly refer to the Defendant's services, and therefore their claims are distinguishable from the cases that they cite. To the extent that the Plaintiffs argue that this issue is not ripe for summary judgment because there are material issues involving the intent of the Defendant, the Court rejects that argument. "[T]he proper examination under *Morales,* is not why the airline refused to provide its services, but whether the claims at issue either expressly refer to the airline's services (which they clearly do) or would have a significant economic effect on the airline's services." *Travel All Over the World v. Saudi Arabia,* 73 F.3d 1423 (7th Cir. 1996) (holding that intentional tort claims brought by travel agency when airlines refused to transport passengers who purchased tickets from agency were related to services, and thus preempt, notwithstanding argument that the actions were part of "vengeful and ongoing course of conduct.")

The Plaintiffs' Claim III is preempted by the ADA, and therefore the Defendant is entitled to Summary Judgment. Based on this conclusion, the Court does not need to reach the other grounds for dismissal of this claim cited in the Defendant's Motion for Partial Summary Judgment.

CONCLUSION

For the foregoing reasons, the Court will GRANT the Defendant's Motion for Partial Summary Judgment as to Claim I; will DISMISS Claim II; and will GRANT the Defendant's Motion for Summary Judgment as to Claim III. The Court shall issue an Order consistent with the foregoing Memorandum Opinion.

October 24, 1997

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA V. CRUZ, et al., Plaintiff, v. AMERICAN AIRLINES, Defendant.	Civil Action No. 96-02817 (CKK)

ORDER

Upon consideration of the Defendant's Motion for Partial Summary Judgment and for Other Appropriate Relief, the Opposition thereto, the Reply, the arguments at the hearing on September 15, 1997, the entire record herein, and the relevant law, it is this 24th day of October, 1997, hereby

ORDERED that the Defendant's Motion for Partial Summary Judgment (#15-1) is **GRANTED as to Claims I and III** for the reasons stated in the accompanying Memorandum Opinion; and it is

FURTHER ORDERED that **Claim II is Dismissed** pursuant to Fed. R. Civ. P. 12(b)(1) for the reasons stated in the accompanying Memorandum Opinion; and it is

FURTHER ORDERED that Judgment is entered in favor of the Defendant as to Claim III; and it is

FURTHER ORDERED that the parties shall file any additional dispositive motions with respect to Claim I no later than October 30, 1997, and if no such motions are filed, the parties shall appear before the Court on **November 7, 1997, at 10:30 a.m.**; and it is

FURTHER ORDERED that Plaintiffs' Motion for Leave to File Second Amended Complaint (#12) is rendered **MOOT** by this Order; and it is

FURTHER ORDERED that Plaintiffs' Motion to Strike Notice of Authorities (#30) is **GRANTED**.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA V. CRUZ, et al., Plaintiff, v. AMERICAN AIRLINES Defendant.	Civil Action No. 96-02817 (CKK)

MEMORANDUM OPINION

This matter is before the Court on the Plaintiffs' Motion for Reconsideration of this Court's Order of October 24, 1997, the Defendant's Response in Opposition to the Plaintiffs' Motion for Reconsideration, and the Plaintiffs' Consolidated Response. Upon considering this Motion, the entire record herein, and the relevant law, the Court grants in part and denies in part the Plaintiffs' Motion for Reconsideration.

Procedural History of the Case

On January 21, 1997, the Plaintiffs filed an Amended Complaint (hereinafter "Amended Complaint"), amending as of right the Complaint earlier filed on December 20, 1997. In Count I of the Amended Complaint, the Plaintiffs sought compensatory damages for the value of luggage that allegedly was lost during their travel on a flight with Defendant American Airlines. In Count II, they sought a declaratory judgment

that the Defendant wrongfully denied the Plaintiffs' lost baggage claims because the Defendant arbitrarily and unreasonably required the Plaintiffs to execute baggage claim forms that apply to domestic travel but that are not applicable to international travel. Also in Claim II, the Plaintiffs sought a permanent injunction, prohibiting the Defendants from publishing, applying, or enforcing the domestic rules to claims arising out of international flights. Finally, in Claim III, the Plaintiffs sought compensatory and punitive damages for fraud and deceit with respect to the Defendant's misapplication of the domestic travel rules to the Plaintiffs' claims.

The Plaintiffs, on June 6, 1997, filed a Motion for Leave to File Second Amended Complaint (hereinafter "Proposed Class Complaint"), which essentially only realleged the claims in the Amended Complaint, but did so as a class action. In Claim IA of the Proposed Complaint, the Plaintiffs sought a declaratory judgment that the Defendant wrongfully denied the Plaintiffs' lost baggage claims because the Defendant arbitrarily and unreasonably required the Plaintiffs to execute baggage claim forms that apply to domestic travel but that are not applicable to international travel, and also sought a permanent injunction, prohibiting the Defendants from publishing, applying, or enforcing the domestic rules to claims arising out of international flights. Claim IA also sought a declaration that the Plaintiffs were entitled to recover the fair value of their luggage, and sought damages in the amount of the fair value of the luggage. Thus, Claim IA of the Proposed Class Complaint reiterated Claims I and II of the Amended Complaint.

In Claim IB of the Proposed Class Complaint, the Plaintiffs sought declaratory relief and damages for the fraud and deceit that the Defendant allegedly committed when it misapplied the domestic travel rules to their international flight. Consequently, Claim IB of the Proposed Class Complaint set forth the same grounds and

requested relief as that of Claim III of the Amended Complaint.

Claim II of the Proposed Class Complaint sought a declaratory judgment that the Defendant unlawfully availed itself of the limited liability of Article 22(h) of the Warsaw Convention;[1] a permanent injunction prohibiting the Defendant from so availing itself of that limited liability; and damages in the amount of the difference between the value of the class members' lost luggage and the amount of damages that the class members previously recovered when the Defendant unlawfully availed itself of the limited liability of the Warsaw Convention. This claim, in essence, provides a more particularized legal basis for the Plaintiffs' Claim I in the Amended Complaint in which the Plaintiffs seek the *value* of their luggage, as opposed to $9.07 for each pound that the baggage weighed.

On July 8, 1997, the Defendant filed a Motion for Partial Summary Judgment. In a Memorandum Opinion dated October 24, 1997, the Court granted the Defendant's Motion for Partial Summary Judgment on the Amended Complaint. As to Count I, the Court found that the Plaintiffs' recovery would be limited to the $9.07 per pound as dictated by Article 22(h) of the Warsaw Convention, and therefore they could not obtain recovery for the fair value of their lost luggage. As to Claim II, the Court concluded that the Plaintiffs had no standing to seek the declaratory or injunctive relief. Finally, the Court concluded that Claim III was preempted by the Airline Deregulation Act (ADA), Pub. L. No. 95-

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air with Additional Protocol, Oct. 12, 1929, 49 U.S. Stat. 3000, T.S. 876 (1934), *reprinted in* 49 U.S.C. App. § 1502 note (commonly known as Warsaw Convention).

904, 92 Stat. 1705 (1978) (now codified at 49 U.S.C. § 40401 (1994)).

In addition, the Court declared that the Motion to File a Second Amended Complaint was rendered moot by the Court's Memorandum Opinion. Following the Court's Memorandum Opinion, the Defendant moved for entry of final judgment on October 29, 1997. On November 7, 1997, the Plaintiffs opposed the entry of final judgment and filed a Motion for Reconsideration. On December 3, 1997, the Plaintiffs filed a Motion to Further Amend the Complaint (hereinafter "Second Proposed Class Complaint"), in which the Plaintiffs added a third class claim to their Proposed Class Complaint. In Claim III of the Second Proposed Class Complaint, the Plaintiffs seek a declaration that the Defendant has applied the wrong maximum free weight allowance when processing claims for lost luggage arising out of travel on certain international flights, and they also seek to recover the difference between the amount of damages calculated using the correct maximum free weight and the amount of damages calculated using the wrong maximum free weight that the Defendant applied.

Also on December 3, 1997, the Plaintiffs filed a separate Complaint for Class Action for Declaratory and Injunctive Relief and for Damages (hereinafter "Class Complaint"), in civil action 97-2883. The Class Complaint is identical to the Second Proposed Class Complaint, including naming the same proposed class representatives.

A. The Court's Ruling that the Motion to Amend is Moot

This Court, in a Memorandum Opinion dated October 24, 1997, previously ruled that the Plaintiffs did not have standing to maintain the allegations in Claim II of the Amended Complaint, which is the equivalent of Claim IA of the Second Proposed Class Complaint. With respect to Claim III of the Amended Complaint,

which is the equivalent of Claim lB of the Second Proposed Class Complaint, the Court found that the claim was preempted by the ADA.

As to Claim I of the Amended Complaint, the Court concluded that the Plaintiffs' recovery would be limited to $9.07 per pound, and therefore, that they were not entitled to recover the fair value of their luggage. In an Order issued January 2, 1997, the Court entered judgment in favor of the individual Plaintiffs on Claim I of the Amended Complaint. In entering judgment for the Plaintiffs, the Court determined based on the Defendant's concessions and the Plaintiffs' attachments to its Consolidated Response, that the maximum allowable free weight in the named Plaintiffs' case was 100 pounds.[2] Therefore, the Court has already ruled against the individual Plaintiffs on the issues presented in Claims IA, II, and III of the Second Proposed Class Complaint regarding whether the Plaintiffs are entitled to seek damages for the *fair value* of their lost luggage, as opposed to $9.07 per pound. Likewise, the Court also decided the issue of whether the maximum allowable free weight is 70 or 100 pounds. The net effect of the Court's rulings in the October 24, 1997 Order and the January 2, 1998 Order is to render moot the named Plaintiffs' individual claims in both the Amended Complaint and the Second proposed Class Complaint.

However, upon considering the case of *In Re Thornburgh*, 869 F.2d 1503, 1509-10 (D.C. Cir. 1989), the Court will vacate that portion of the Court's October 24, 1997 Order which held that the Motion to Amend

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[2] Pursuant to this Court's Order on December 11, 1997, the Defendant indicated in a Submission filed December 16, 1997, that it did not contest the fact that as to the flight for the named Plaintiffs, the maximum allowable free weight was 100 pounds.

was rendered moot by the October 24, 1997 Memorandum Opinion. *In Re Thornburgh* provides that where a class representative's claims are mooted prior to certification, the court should not dismiss the class action. *In Re Thornburgh*, 869 F.2d at 1509-10; *see also Rosetti v. Shalala*, 12 F.3d 1216, 1228 (3rd Cir. 1993) (holding that the mootness of representative's claims did not deprive court of jurisdiction over pending motion for certification). While some courts allow the named plaintiffs to continue as class representatives even though their individual claims are moot, this circuit has indicated that the better course of action is to allow for the substitution of class representatives. *See In Re Thornburgh,* 869 F.2d at 1502 n. 7. Thus, it appears that the Motion to Amend was not rendered moot by the Court's October 24, 1997 Memorandum Opinion and Order, and the Court will reinstate the Motion to Amend.

Nonetheless, the Court finds that even though the Motion to Amend is not moot, the Motion to Amend should be denied because the Plaintiffs proceeded to file a Class Action in civil action no. 97-2883, which names class representatives and sets forth claims that are identical to those in the Second Proposed Class Action. Furthermore, the Plaintiffs are not prejudiced by this ruling because even if the Court were to allow the Proposed Class Complaint or the Second Proposed Class Complaint to be filed, the named representatives, having had their individual claims resolved, would not be proper class representatives, and new class representatives would have to be substituted for the named plaintiffs.[3]

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[3] The issue of the propriety of the named class representatives in civil action no. 97cv 2883, however, is not properly before the Court at this time, and thus in this Memorandum Opinion, the Court does not make any determination on that issue.

B. The Court's Ruling that the Plaintiffs Lacked Standing to Assert a Claim for Declaratory and Injunctive Relief.

As to the Court's ruling on Claim II, the Court adopts and incorporates its analysis in the October 24, 1997 Memorandum Opinion in which the Court concluded that the Plaintiffs had no standing to assert this claim. The Plaintiffs have not provided any additional facts or arguments that persuade the Court to reconsider its earlier ruling. The Motion for Reconsideration as to this argument is denied.

C. The Court's Findings on the Amount of the Defendant's Liability

The Plaintiffs challenge the Court's finding as to the amount of the Defendant's liability. Specifically, the Plaintiffs contest the Court's statement that the approximate value of each bag was $5,000. The total loss of the five bags allegedly amounted to approximately $15,000. Thus, the average value of each bag is only $3,000, not $5,000 as the Court stated. The reference to the wrong average value of each piece of luggage, however, does not alter the Court's conclusion as to the amount of liability. The Court considered the value of luggage to determine how much, in applying the formula of $9.07 per pound, the luggage would have had to weigh in order for the Plaintiffs to recover the fair value of the luggage. The Court's calculation that the bags would have to weigh approximately 333 pounds each is based on a $3,000 approximate value for each bag. The Court's misstatement as to the average value of each bag is therefore immaterial to the Court's conclusion.

The Plaintiffs also argue that the fact of whether the Defendant's tariff deemed unweighed luggage to be seventy (70) pounds was not addressed by the Defendant's Rule 108 (h) statement, or that the fact was not material to the issues before the Court in reviewing the Motion for Partial Summary Judgment. In paragraphs 6 and 10

of the Defendant's Rule 108(h) Statement, the Defendant refers to the Defendant's tariff that provides for an allowable maximum free weight of seventy (70) pounds. It is apparent that the exact amount of the maximum allowable free weight was not dispositive of the issue that was before the Court on the Defendant's Motion for Summary Judgment, i.e. whether the Defendant's liability would be limited pursuant to Article 22(h) of the Warsaw Convention.[4] Rather, the precise amount of the maximum allowable free weight is pertinent to the issue of the amount of recovery to which the Plaintiffs are entitled. As the Court noted in its October 24, 1997 Memorandum Opinion, this issue was not before the Court at that time. It was, however, before the Court on the Defendant's Motion for Entry of final Judgment, which was addressed in a Memorandum Opinion dated January 2, 1998.

CONCLUSION

For the foregoing reasons, the Court will grant in part and deny in part the Plaintiff's Motion to Reconsider. The Court shall issue an Order consistent with the foregoing Memorandum Opinion.

---

[4] The Court used the 70 pound maximum allowable free weight in deciding that the weight of three pieces of luggage could be approximated, and thus that the limits of liability applied. Although the parties now agree that the maximum allowable free weight was 100 pounds, that difference does not change the Court's decision that the limits of liability apply. The operative fact is that the Defendant had established a default weight in the event that the actual weight was not recorded.

January 2, 1998

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA V. CRUZ, et al., Plaintiff, v. AMERICAN AIRLINES, Defendant.	Civil Action No. 96-02817 (CKK)

ORDER

Upon consideration of the Plaintiffs' Motion for Reconsideration, the entire record herein, and the relevant law, it is this 2nd day of January, 1998, hereby

ORDERED that Plaintiffs' Motion to Reconsider is **GRANTED IN PART AND DENIED IN PART;** and it is

FURTHER ORDERED that the Court's Order Dated October 24, 1997, is vacated as to the issue of the mootness of the Motion for Leave to File Second Amended Complaint (#12);

FURTHER ORDERED that the Motion for Leave to File Second Amended Complaint (#12) and the Motion to Further Amend (#41) are **DENIED.**

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA V. CRUZ, et al., Plaintiff, v. AMERICAN AIRLINES Defendant.	Civil Action No. 96-02817 (CKK)

MEMORANDUM OPINION

This matter is before the Court on the Defendant's Motion for Entry of Final Judgment in Favor of the Plaintiffs, the Plaintiffs' Response to Motion for Entry of Final Judgment, the Defendant's Reply, the Plaintiffs' Consolidated Response, and the Defendant's Submission Pursuant to this Court's Order of December 11, 1997. The Plaintiffs' claims arise out of the loss of their luggage during an international flight and the processing of their claims for the loss of that luggage. The Plaintiffs filed a complaint seeking compensatory and punitive damages, and declaratory and injunctive relief. The Defendant moved for partial summary judgment, and in an Order dated October 24, 1997 (as modified December 31, 1997) the Court granted the Defendant's Motion. The Defendant now moves for entry of judgment in favor of the Plaintiff. At this time, the Court concludes that there are no genuine disputes of material issues, and

thus the Plaintiffs are entitled to judgment as a matter of law.

FACTUAL BACKGROUND

This action arises out of the Plaintiff's claims for damages for their baggage that they allege the Defendant lost during the Plaintiffs' international flight from Washington, DC to Santo Domingo on or about December 21, 1995. On or about December 21, 1995, Plaintiffs Maria V. Cruz, Gustavo Cruz, Joaquin Rodriguez, Beato Cruz, and Yovary Polanco[1] checked their luggage with Defendant American Airlines and received baggage claim stubs for each piece of luggage. (Complaint ¶ 4; Answer ¶ 4; Deft.'s Rule 108(h) ¶ 1).[2] The Defendant weighed approximately half of the bags that the Plaintiffs tendered to the Defendant, (Complaint ¶4; Deft.'s Rule 108(h) ¶ 4), and because some of the luggage was overweight, Maria Cruz paid $135.00 in overweight charges. (Complaint ¶ 4; Deft.'s Rule 108(h) ¶ 5; Deft.'s Mot. for Partial Summ. J. at 5-6 & n.4, 9). The baggage claim stubs did not state the weight of the bags. (Complaint ¶ 4; Rule 108(h) ¶ 5).

On December 22, 1995, when the Plaintiffs arrived at their destination of Santo Domingo, they discovered that five pieces of their luggage had not been delivered. (Complaint ¶¶ 5,6; Answer ¶¶ 4, 5; Deft.'s Rule 108(h) ¶ 7). That same day, they filled out and submitted to the Defendant a missing property report. (Complaint ¶ 6;

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[1] Both Gustavo Cruz and Joaquin Rodriquez are minors, and Maria Cruz brings the action on their behalf. Similarly, Yovary Polanco is a minor, and Sandra Maria Cruz brings this action on his behalf.

[2] Citations to Deft.'s R. 108(h) statement reference the Rule 108(h) statement attached to the Defendant's Motion for Partial Summary Judgment.

Plaintiffs' Missing Property Report in Deft.'s Mot. for Partial Summ. J., Attachment III; Deft.'s Rule 108(h) ¶ 8). Eventually, one bag was returned, although it was damaged and empty. (Complaint ¶ 6; Answer ¶¶ 4,5; Deft.'s Rule 108(h) ¶¶ 2, 7). As to three of the lost pieces of luggage, the Plaintiffs paid excess weight fees. (Plaintiffs' Declaration of Lost Property in Deft.'s Mot. for Partial Summ. J., Attachment III; Deft.'s Mot. for Partial Summ. J. at 5 n. 4, 9).

Thereafter, the Defendant rejected the Plaintiffs' lost luggage claims because the Plaintiffs did not file the declaration of lost property within 30 days of their loss. (Complaint ¶ 9; Answer ¶ 7; Deft.'s Rule 108(h) ¶ 12).[3] The Plaintiffs filed a Complaint, and then an Amended Complaint, seeking damages for the value of the luggage that they allege the Defendant lost during their international flight.[4]

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[3] This 30 day limitation for filing a written claim is encompassed in Condition 12 of the Defendant's Conditions of Carriage ("Condition 12"). *See* Ex. A of Plaintiffs' Requested Submission. Condition 12 applies only to claims for luggage lost during domestic travel, and does not govern claims for luggage lost during international travel. The Defendant previously conceded that it misapplied this Condition to the Plaintiff's claims, which arose out of international travel, not domestic travel.

[4] They also sought a declaratory judgment that the Defendant unlawfully applied Condition 12 and unlawfully required the Plaintiffs to complete a declaration of lost property, and they seek to enjoin the Defendant from "publishing, applying or enforcing such rules in foreign air transportation." As to this claim, the Court concluded in its October 24, 1997 Memorandum Opinion, that the Plaintiffs did not have standing. In addition, the Plaintiffs requested compensatory and punitive damages for fraud and deceit, which they claim the Defendant committed when applying Condi-

[Footnote continued on next page]

The Court, in a Memorandum Opinion dated October 24, 1997, concluded that the Plaintiffs were not entitled to recover the fair value of their lost luggage. Rather the Court held that, notwithstanding the fact that the baggage checks did not include the weight of the Plaintiffs' luggage, the Defendant's liability was limited pursuant to Article 22(2) of the Warsaw Convention (Convention)[5] to $ 9.07 per pound of their checked luggage. As part of the instant Memorandum Opinion, the Court adopts and incorporates its analysis set out in the October 24, 1997 Memorandum Opinion of the issue of whether Article 22(2) of the Warsaw Convention applies.

If the Defendant fails to weigh a piece of luggage, then the Defendant's tariff sets the weight at the maximum free allowable weight. *See* Tariff 55, page AA-66, attached to Plaintiff's Consolidated Resp.; *see also* Tariff 55, page AA-66, attached to Exhibit 1 of Attachment 5 of Deft.'s Mot. for Part. Summ. J. Originally, in the Defendant's Motion for Entry of Judgment, as well as in the Defendant's Motion for Partial Summary Judgment, the Defendant maintained the position that the applicable tariff set the maximum allowable free weight of the Plaintiffs' luggage at 70 pounds per piece of luggage. *See* Deft.'s R. 108(h) Stmt. ¶ 6. In the Defendant's Submission Pursuant to this Court's Order of December 11, 1997 (hereinafter "Defendant's Submission"), the De-

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[Footnote continued from previous page]
tion 12 to their lost baggage claims. As to this claim, the Court held that the claim was preempted by the Airline Deregulation Act.

[5] Convention for the Unification Of Certain Rule Relating to International Transportation By Air With Additional Protocol, Oct. 12, 1929, 49 U.S. Stat. 3000, T.S. 876 (1934), *reprinted in* 49 U.S.C. App. § 1502 note (commonly known as "Warsaw Convention").

Defendant concedes for purposes of this case, that the tariff in force at the time of the Plaintiffs' flight provides that the maximum allowable free weight of the baggage for the Plaintiffs' flight was 100 pounds. The Plaintiff agrees that the applicable tariff set the maximum allowable free weight of the Plaintiffs' luggage at 100 pounds. *See* Plaintiffs' Response to Motion for Entry of Judgment; Plaintiffs' Consolidated Response.

DISCUSSION

Summary judgment is appropriate pursuant to Fed. R. Civ. P. 56 if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The movant bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v Catrett, 477 U.S. 317, 323 (1986). Thereafter, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"477 U.S. at 324.

In deciding a motion for summary judgment, the court must believe all of the evidence produced by the non-movant, and must draw all favorable inferences in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 255, 255 (1986). Ultimately, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or

whether it is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251.

Amount of Recovery

The material facts as to the Defendant's liability for the lost luggage are not in dispute. The Defendant admits that it checked the Plaintiffs' luggage and that five pieces either were never delivered or were delayed in delivery but received empty. Furthermore, the Defendant, by moving for an entry of judgment in favor of the Plaintiff concedes that it is responsible for the loss of the luggage.

As to three pieces of luggage, the parties are aware of the approximate weight of the luggage given that the Plaintiffs paid $135 in overweight charges for three of the pieces of luggage. The Defendant's Tariff, AA-110-E provides that where a bag is overweight by thirty-five pounds or less, the passenger must pay $35.00 in excess weight charges, and where the bag is overweight by thirty-five to seventy pounds, the passenger must pay $70.00 in excess weight charges. *See* Tariff, AA-110-E attached to Deft.'s Mot. for Part. Summ. J. Thus, one piece of the Plaintiffs' luggage was overweight by at most thirty-five pounds, and two pieces were overweight by at most seventy pounds. Given that the applicable maximum allowable free weight for the luggage on the Plaintiffs' flight was 100 pounds, the Court concludes that as to these three pieces of luggage, one weighed at most 135 pounds and two pieces weighed at most 170 pounds each. Pursuant to the Defendant's Tariff 55, the remaining two pieces of luggage are deemed to weigh 100 pounds each because the actual weight was not indi-

cated on the baggage check. In total, the lost luggage weighed 675 pounds.[6]

Article 22(2) of the Convention establishes a limitation on the liability of the carrier for the loss of luggage during the transportation of checked baggage and goods:

> In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram (or $9.07 per pound), unless the consignor has made at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that sum is greater than the actual value to the consignor at delivery.

Article 22(2).[7] At $9.07 per pound, the Plaintiffs are entitled to recover $6,122.25.[8]

---

[6] In its Memorandum Opinion of October 24, 1997 the Court, relying on the Defendant's representations that the maximum allowable free weight was 70 pounds, concluded that the total weight was 525 pounds. The Defendant, however, now agrees that the maximum allowable free weight is 100 pounds, and thus the Court relies on this undisputed fact in arriving at its present calculation of the total weight of the Plaintiffs' lost luggage.

[7] As noted above, the Court previously ruled in its October 24, 1997 Memorandum Opinion that this limitation of liability applies to the Plaintiffs' claims.

[8] Both the Plaintiffs and the Defendant have accepted this amount as being the appropriate amount of recovery pursuant to the Court's analysis. *See* Defendant's Submission; Plain-

[Footnote continued on next page]

Prejudgment Interest

Plaintiffs also seek an award of prejudgment interest at the commercial prime rate of 8.5%. The Defendant objects to such an award on two grounds. First the Defendant maintains that the case of District of Columbia v. Pierce Associates, 527 A.2d 306 (D.C. 1987) governs the award of prejudgment interest in the instant case, and that *Pierce Associates* directs that the applicable interest rate is 6.5%.[9] Second, the Defendant argues that the Plaintiffs are not entitled to prejudgment interest at all because within six months of the filing of the above-captioned case, the Defendant made an offer of judgment in an amount that is greater than the amount of the actual judgment.

"[W]hether pre-judgment interest is to be awarded is subject to the discretion of the court and equitable considerations." *Motion Picture Ass'n of America, Inc. v. Oman,* 969 F.2d 1154, 1157 (D.C. Cir. 1992). The purpose of a prejudgment award is to "compensate the plaintiff for any delay in payment resulting from litigation." *Oldham v. Korean Air Lines Co., Ltd.* 127 F.3d 43, 54 (D.C. Cir. 1997); *see also Miller v. Robertson,* 266 U.S. 243, 258 (1924) ("[W]hen necessary in order to arrive at fair compensation, the court in the exercise of sound discretion may include interest or its equivalent as an element of damages.") The burden is on the Plaintiffs to set forth evidence that prejudgment interest is necessary to fully compensate them. *See Kuwait Air-*

[Footnote continued from previous page]
tiffs' Response to Defendant's Motion to Strike and Opposition to Plaintiffs' Consolidated Response.

[9] Actually, in *Pierce Associates,* the D.C. Court of Appeals found that the applicable interest in that case was 6% as established in D.C. Code Ann. § 28-3302(a).

ways Corp. v.. American Security Bank, 1987 WL 33448 (D.D.C. Dec. 23, 1997).

In deciding whether prejudgment interest is warranted, courts consider several factors, such as whether the plaintiff was less than diligent in prosecuting the action; whether the defendant has been unjustly enriched; whether an award would be compensatory; and whether fairness and relative equities favor an award. *See, e.g., Wickham Contracting Co. v. Local Union No. 3, Int'l Brotherhood of Electrical Workers*, 955 F.2d 831, 833-834 (2d Cir. 1992); *Feather v. United Mine Workers of America*, 711 F.2d 530, 540 (3d Cir. 1983).

In the instant case, the Court finds that there is no evidence that the Plaintiffs were dilatory in filing their complaint, but also that the Plaintiffs have made no showing as to why prejudgment interest is necessary to provide full compensation. Furthermore, the Court finds that on this record, equitable considerations do not favor the award of prejudgment interest where the defendant made an offer of judgment within six months of the filing of the case, and where that offer was greater than the amount of the actual judgment. Accordingly, the request for prejudgment interest is denied.

CONCLUSION

For the foregoing reasons, the Court will grant the Defendant's Motion for Entry of Judgment, and will enter judgment in favor of the Plaintiffs in the amount of $6,122.25. The request for prejudgment interest will be denied. The Court shall issue an Order consistent with the foregoing Memorandum Opinion.

January 2, 1998

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARIA V. CRUZ, et al., Plaintiff, v. AMERICAN AIRLINES, Defendant.	Civil Action No. 96-02817 (CKK)

ORDER

Upon consideration of the Defendant's Motion for Entry of Final Judgment, the Plaintiffs' Response thereto, the Defendant's Reply, the Plaintiffs' Consolidated Response, the Defendants' Submission of December 16, 1997, the entire record herein, and the relevant law, it is this 2nd day of January, 1998, hereby

ORDERED that the Defendant's Motion for Entry of Final Judgment (#35) is **GRANTED as Modified by Defendant's Submission** [#50] for the reasons stated in the accompanying Memorandum Opinion; and it is

FURTHER ORDERED that the Plaintiffs' request for prejudgment interest [#38] is **DENIED**; and it is

FURTHER ORDERED that Judgment in the amount of $6,122.25 is entered in favor of the Plaintiffs; and it is

FURTHER ORDERED that the Defendant's Motion to Strike the Plaintiffs' Consolidated Response is **DENIED.**

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

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APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7186 **September Term, 1999**
96cv02817
97cv02883

Maria V. Cruz, for herself and as representative of Gustavo Cruz and Joaquin Rodriguez minors, et al.,

Appellants

v.

American Airlines, Inc.,

Appellee

Consolidated with 97-7187

[Entered Nov. 26, 1999]

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7186 **September Term, 1999**
96cv02817
97cv02883

Maria V. Cruz, for herself and as representative of Gustavo Cruz and Joaquin Rodriguez minors, et al.,

Appellants

v.

American Airlines, Inc.,

Appellee

Consolidated with 97-7187

[Entered Nov. 26, 1999]

BEFORE: Silberman and Tatel, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed November 10, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Former Circuit Judge Wald was the third member of this panel.

APPENDIX I

Relevant Provisions of Warsaw Convention as modified by Montreal Protocol No. 4, *reprinted in* S. EXEC. REP. NO. 105-20, at 22-23 (1998).

Article 3

1. In respect of the carriage of passengers a ticket shall be delivered containing:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.

2. The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

Article 4

1. In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket which complies with the provisions of Article 3, paragraph 1, shall contain:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place;

(c) a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.

2. The baggage check shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1(c)) does not include the notice required by paragraph 1(c) of this Article, he shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

Supreme Court, U.S.
FILED
APR 19
CLERK

(2)

No. 99-1565

In The

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MARIA V. CRUZ, for herself and as representative of GUSTAVO CRUZ and JOAQUIN RODRIGUEZ, minors; BEATO CRUZ; SANDRA MARIA CRUZ as representative of YOVARY POLANCO, a minor; JOSE ALFREDO GOMEREZ; and LENOR DURAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ISBN 0-8377-1301-3 . . . . . App. B

REASONS FOR DENYING THE WRIT

The sole issue presented is whether the Court of Appeals correctly held that petitioner air carrier, as expressly provided by Warsaw Article 4(4), may not avail itself of the Convention's checked baggage liability limit where it does not comply with the mandate of Article 4(3)(f) that the weight of the checked baggage be recorded on the passenger's baggage check, *i.e.*, the combined passenger ticket and baggage check. The opinion below adheres to the clear and unambiguous text of a multinational Treaty and is wholly consistent with its drafting history, as well the decision of this Court in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). There is no conflict among the Circuits on the issue presented. Moreover, it is of rapidly fading import since Article 4(3)(f) was deleted from the Convention, as applicable to transportation involving the United States, by an Treaty amendment which came into force on March 4, 1999.

A. NO CIRCUIT CONFLICT EXISTS

Three Circuit Courts of Appeal have addressed the issue presented, and no conflict exists as requires resolution by this Court.

The most expansive and recent of these decisions is that of the District of Columbia Circuit from which review is here sought. *Cruz v. American Airlines*, 193 F.3d 526 (D.C.Cir. 1999). Four months earlier, the Ninth Circuit similarly held that Warsaw Article 4(4) barred a carrier from availing itself of the Convention's checked baggage liability limit where it had failed to comply with the weight recordation requirement of Article 4(3)(f). *Spanner v. United*

Airlines, 177 F.3d 1173 (9th Cir. 1999). In so holding, both courts found that a literal construction of the clear and unambiguous command of the Treaty text was required consistent with this Court's decisions on Treaty construction, particularly that of *Chan*, in holding that courts lack the power to alter the clear text of the Convention.

Twelve years earlier, the Second Circuit had considered the issue in *Republic National Bank v. Eastern Airlines*, 815 F.2d 232 (2d Cir. 1987). Employing the "commercial significance" test it earlier had adopted in construing Warsaw's Article 8 cargo waybill provisions, the court held that a literal compliance with the weight recordation requirement of Article 4(3)(f) is not required in those cases "where, as here, the traveler is more like a commercial shipper than the typical airline passenger." *Republic National Bank*, 815 F.2d at 237. As discussed below, the Second Circuit's Article 8 analysis, in light of *Chan*, has been limited to its facts.

Moreover, the Second Circuit never has found the literal mandate of Warsaw Article 4(4) not to be fully applicable to the checked baggage claims of "typical airline passengers." Nor have the courts in the Eastern and Southern Districts of New York in considering and rejecting carriers' invocation of that limit. *Vekris v. People's Express Airlines*, 707 F.Supp.675 (S.D.N.Y. 1988); *Tchokponhove v. Air Afrique*, 953 F.Supp. 79 (S.D.N.Y. 1996); *Siben v. American Airlines*, 913 F.Supp. 271, 276-77 (S.D.N.Y. 1996). Moreover, it simply is not true, as petitioner asserts, that the District Court and the Second Circuit recently have held that a carrier may avail itself of Warsaw's baggage liability limit where the baggage weight is not recorded on the

transportation documents. Petition, p.10, n.6 citing *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155 (S.D.N.Y. 1996), *rev'd in part, aff'd in part*, 122 F.3d 99 (2d Cir. 1997). In fact, as noted in respondents' Reply Brief to the Court of Appeals reproduced in pertinent part in Appendix A hereto, that issue, as petitioner knows, was not decided by the District Court and was not even raised on appeal!

B. THE ISSUE PRESENTED LACKS SIGNIFICANCE

By a Treaty amendment effected by Montreal Protocol No. 4, Article 4(3)(f) was removed from Warsaw, effective March 4, 1999. The issue presented thus has limited and rapidly diminishing significance and does not warrant this Court's consideration. Since Warsaw Article 29 imposes a two year period of limitations on damage suits, all suits as might raise that issue will be foreclosed within less than a year. In addition to the instant *Cruz* litigation, only three other cases, filed in November and December, 1999 in the U.S. District Court for the District of Columbia, are now pending which raise the issue presented and rely upon the Court of Appeals' decision in *Cruz*. Petition, p.24, n.11.

C. THE ISSUE WAS CORRECTLY DECIDED.

Both the weight of judicial opinion and Warsaw's clear negotiating history are in accord with the Court of Appeals' determination that the weight recordation requirement of Article 4(3)(f) is a mandatory requisite for a carrier's ability to avail itself of the Convention's baggage liability limit. In so holding, the Court of Appeals in *Cruz* flatly repudiated the earlier decision of the D.C. District court finding the requirement to be a technical and insubstantial omission from

which a court may depart to effectuate its own conception of Convention purposes. *Cruz*, Petition, pp. 7a-8a, rejecting *Martin v. Pan American World Airways*, 563 F.Supp. 135 (D.D.C. 1983).

Martin, the leading decision espousing petitioner's position and its reasoning, has been rejected by many courts over the years both prior to and again in light of this Court's decision in *Chan*. See, *Gill v. Lufthansa German Airlines*, 620 F.Supp. 1453, 1455-56 (S.D.N.Y. 1985); *Vekris, supra*; *Arkin v. New York Helicopter Corp.*, 544 N.Y.S. 2d 343, 345 (App. Div. 1st Dept. 1989); *Da Rosa v. TAP Air Portugal*, 796 F.Supp. 1508 (S.D.Fla. 1992); *Tchokponhove*, supra.

Warsaw Article 4(3)(f) is no stranger to this Court. The concurring opinion of four Justices in *Chan* states that the particulars of Warsaw Articles 4(3)(d), (f) and (h) are essential obligatory requirements. *Chan*, 490 U.S. at 144-45. As there noted, that conclusion is manifest from Warsaw's clear negotiation history on the subject. We reproduce in Appendix B a portion of respondents' Brief to the Court of Appeals detailing that history.

Lastly, petitioner extensively relies upon a series of Second Circuit precedent dealing with the interpretation of the rather dissimilar provisions of Warsaw Article 8 involving cargo carriage. In *Exim Indus., v. Pan Am. World Airways, Inc.*, 754 F.2d 106 (2d Cir. 1985), the court sanctioned a deviation from the literal application of some Article 8(h) and (i) waybill particulars because of textual ambiguity, principally flowing from the use of the French "ou." *Distribuidora Dimsa v. Linea Aerea del Cobre S.A.*, 976 F.2d 90, 96-97 (2d Cir. 1992). Following this Court's

decision in *Chan*, the Second Circuit severely limited its *Exim Industries* decision and "commercial significance" doctrine to its facts. *Maritime Insurance Co. v. Emery Air Freight*, 983 F.2d 437, 439-441 (2d Cir.1993). Inexplicably, petitioner does not bring to this Court's attention the Second Circuit's most recent pronouncement on this subject. In *Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1033-34 (2d Cir. 1996), the court held that the omission of any enumerated cargo waybill particular deprives the carrier of recourse to the Convention's liability limit. Current Second Circuit law as to Warsaw's cargo liability limitation does not conflict with *Cruz*. See, *Tchokponhove, supra*.

D. ARTICLE 4(3)(f) WAS EXCISED BY AMENDMENT

Montreal Protocol No. 4 amended Warsaw to delete Article 4(3)(f) in its entirety and thereby abolish the long standing requirement that checked baggage weight must be recorded on the transportation document to enable the carrier to avail itself of the Convention's liability limit. The Court of Appeals held that "Montreal Protocol 4's luggage ticket provisions clearly amend prior law; as such they cannot possibly be given retroactive effect by being labeled a 'clarification'." Petition, p. 9a. Petitioner contends that what transpired was a mere clarification of the existing text.

The wholesale deletion of a requirement whose observance was a mandatory requisite for recourse to the Convention's liability limit hardly can be viewed as a clarification of a provision which has governed U.S. international transportation for almost seventy years. The meaning of Article 4(3)(f) has not been in dispute; what has been is whether it must be literally applied. There is no

comparability between this amendment of the Convention and those two instances where Montreal Protocol No. 4 made slight textual changes in continuing Warsaw provisions which the courts have held serve to clarify, and not to alter or effect any substantive change in, those provisions. Those decisions illustrate the fundamental difference between clarifying textual modifications and the total textual excision that occurred here. See, *Cortes v. American Airlines*, 177 F.3d 1272, 1282-90 (11th Cir. 1999); *El Al Israel Airlines, Ltd. v. Tseng*, 119 S.Ct. 662, 674 (1999).

Unless the law maker has authoritatively indicated that a substantive change should be given retroactive effect, a change in law "which takes away or impairs existing rights acquired under existing laws" or "attaches new legal consequences to events completed before its enactment" will not be given retroactive effect. *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994); *Hughes Aircraft Co. v. U.S.*, 117 S.Ct. 1871, 1876-77 (1997). No such direction here exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Excerpt from respondents' Reply Brief to the Court of Appeals in *Cruz v. American Airlines*, pp. 7-8.

American argues (Brief, p. 19) that the Second Circuit in its *Tseng* disposition effectively ratified a purported holding by the District Court that a carrier may utilize a tariff "deemed" weight in applying the Warsaw liability limit where the weight is not inscribed on the baggage ticket. American is simply wrong as to what was before, and what were the holdings of both the *Tseng* District Court and Court of Appeals.

Ironically, it was the *Spanner* District Court, later reversed by the Ninth Circuit on the ultimate merits, which first considered and rejected the contention that this "deemed weight" issue had been adjudicated by the *Tseng* District Court. Judge Illston noted:

> "United relies extensively on Tseng v. El Al Israel Airlines, Ltd., 919 F.Supp. 155 (S.D.N.Y. 1996), aff'd in part, rev'd in part, 122 F.3d 99 (2d Cir.1997). That case is not particularly helpful here, however. While the court in Tseng holds that '[w]here the weight of a passenger's baggage is not noted on the baggage check, the weight may be based on the

> maximum allowable weight as set forth in the airline's tariff,' id at 160, the court was simply trying to determine the appropriate compensation under the Warsaw Convention when no evidence about the weight of the lost bag was available, rather than trying to determine what the airline's exact obligations were under Article 4(4)." 1998 WL 196466 *4, n.4 (N.D.Cal.)

Contrary to American's contention, it is clear that the issue of non-compliance with Article 4(3)(f) was neither raised nor contested in *Tseng*. As noted in the Second Circuit's decision, El Al did file an unsuccessful cross-appeal from the District Court's damage award. 122 F.3d at 108. But we are advised by the carrier's counsel of record, Diane Westwood Wilson of Condon & Forsyth, that El Al's challenge was to the trial court's finding that the carrier had been guilty of fraud within the meaning of Article 26(4) such as to excuse plaintiff Tseng's failure to comply with the notice requirements of Article 26(2). So much for the first of the alleged Second Circuit "precedents" advanced by American.

EXHIBIT B

Excerpt from respondents' Brief to the Court of Appeals in *Cruz v. American Airlines*.

The term "Minutes" refers to *Second International Conference on Private International Law, October 4-12, 1929, Warsaw, Minutes (R. C. Horner & D. Legrez translators)*, Fred B. Rothman & Co. 1975, ISBN 0-8377-1301-3.

The insertion into the draft Treaty of "number of pieces and weight" ticket particular was suggested by the German and Austrian delegations. Minutes 287-88, 316-17. Article 4 in its present form came before and was adopted by the plenary at its Sixth Session on the morning of October 9, 1928. The matters before the session were summarized by reporter De Vos as being: "[w]hat are the particulars to be inserted on the baggage check; what are the compulsory particulars; then, the principle of sanction in the case of the non-existence of the ticket or mistake in the particulars to be put on the baggage check." Minutes, 155. Mr. De Vos reported that the drafting committee of legal experts was in agreement in accepting proposals for new particulars including "[u]nder letter (f), indication of the number and weight of the parcels" and under letter (h) the statement that carriage is governed by the system of liability established by the Convention. Minutes, 155-56. De Vos then concluded his presentation by stating:

> On the subject of compulsory particulars, the committee decided to reduce these compulsory particulars to a strict minimum, and we have recognized letters (d), (f) and (h) as compulsory. This relates to the third paragraph relative to the sanction for omission of particulars on the check. The last paragraph was not modified like Article 3; that is to say that we have retained the same sanctions in the case of errors in the particulars, however only letters (d), (f) and (h) are now compulsory particulars. Minutes, 156.

The proposals of the drafting committee, as thus explicated, were adopted by the plenary without objection. Minutes, 156.

MOTION FILED

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Petitioner,

v.

MARIA V. CRUZ, ET AL.,
Respondents.

On Petition for a Writ Of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITIONER

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITIONER

The Air Transport Association of America ("ATA"), having been unable to secure the consent of the respondents, respectfully moves the Court under Sup. Ct. R. 37.2(b) for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

The ATA is an association of all major domestic air carriers and five foreign air carriers.[1] Its principal purpose is to support its members by promoting airline safety and advocating common industry positions. Since its inception in 1936, the ATA has been deeply involved in the development of international law governing international air transportation. It has filed briefs *amicus curiae* in, among other cases, *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155 (1999), and *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984), both involving the construction of the Warsaw Convention.

The decision below causes grave concern to the ATA's members. It overturns decades of established industry practice approved by the Executive Branch, and exposes the airlines to extensive litigation and vast liabilities – all in pursuit of a supposed requirement that the court of appeals itself acknowledged "makes little real sense" and has "no apparent purpose." Pet. App. 7a. If allowed to stand, the decision will senselessly harm the airlines and raise the cost of air travel for their passengers.

Furthermore, ATA members engaging in foreign air commerce rely on the uniform system of liability rules established by the Warsaw Convention. The conflicting decisions of the lower courts regarding their liability disrupts this reliance and defeats "the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 552 (1991).

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[1] The ATA's 23 U.S. members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airlines, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The ATA's associate, foreign-flag members are Aeromexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana Airlines.

The attached brief supplements rather than duplicates the petition. It demonstrates that the court of appeals misconstrued Article 4(4) of the Convention by relying on a word in the American text that does not appear in the governing French text, and by failing to consider the Executive Branch's long-standing contrary interpretation of that provision. The brief also brings to the Court's attention the impact of the case at bar on other pending and possible class actions against the carriers.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER[1]

INTRODUCTION AND SUMMARY

The court below, declaring itself locked in by Warsaw Convention language it found "unyielding," imposed on air carriers a requirement that the court itself considered purposeless and that the airline industry, with the approval of the Executive Branch, has not considered applicable for decades. We show in

[1] No counsel for any party had any role in authoring this brief, and no person other than *amicus curiae* made any direct monetary contribution to its preparation or submission. Although the petitioner is a member of the ATA, it made no special contribution to the preparation of this brief.

Part I that the court of appeals erred in its view of the language at issue, in particular by disregarding the controlling French text, which does not even contain the word the court of appeals deemed dispositive. Our examination demonstrates that Article 4(4) of the Convention is in fact susceptible of different interpretations, which then permissibly leads us to Part II, where we show that the federal regulators of the airline industry have approved of the airlines' practice under Article 4(4) since at least the 1970's. That interpretation by the Executive Branch is entitled to "great weight" under this Court's decisions, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961), and strongly supports the conclusion that the court of appeals' contrary interpretation was incorrect.

In Part III, we urge the Court to grant review here notwithstanding the effect of the Montreal Protocol No. 4 on future cases. As a doctrinal matter, the decision below creates a disturbing lower court conflict over the construction of the Warsaw Convention. Moreover, as a practical matter, the decision will breathe life into existing class actions against the airlines for conduct approved by their regulators and invite new suits potentially involving thousands of claims.

ARGUMENT

I. THE COURT BELOW ERRED IN RULING THAT ARTICLE 4(4) IS UNAMBIGUOUS

This case turns on the meaning of Article 4(4) of the Warsaw Convention,[2] which in the American translation of the governing French text provides that

> if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted in* 49 U.S.C. app. § 1502 note.

> avail himself of those provisions of the convention which exclude or limit his liability.

The "particular" set out at Article 4(3)(*f*) is "[t]he number and weight of the packages." As a matter of consistent practice for many years, and with the knowledge and approval of the Executive Branch (see *infra*), U.S. airlines typically have not recorded the weight of passengers' baggage on the baggage check, but instead have followed a practice – beneficial to passengers – of assuming that each piece of baggage weighs the maximum amount permitted by the airline's tariff without incurring excess weight charges. By doing so, they have allowed passengers with baggage weighing far less than the maximum allowed under the carriers' tariff to receive a much higher level of compensation than they would otherwise be entitled to under the Convention.[3] The question is whether this benevolent practice strips the airlines of their limited liability under the Convention.

The district court ruled that, because the text of Article 4(4) joins the enumerated particulars with the conjunction "and" rather than "or," "the plain language of this provision directs that liability is lifted only if all three particulars are missing." Pet. App. 22a-23a. The court of appeals found that this interpretation was "linguistically possible," but not "reasonable." *Id.* 6a. Its contrary linguistic analysis consisted entirely of one conclusory sentence:

> It is rather clear to us that the word "and" means that Article 4(4) of the Convention obliges a carrier to comply with each of the three particulars. *Id.*

The court of appeals' conclusion that Article 4(4) has a single "unyielding" meaning (*id.* 7a) is incorrect. It is an *ipse dixit* rather than analysis, simply backhanding another interpretation the court

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[3] The average checked bag weighs 25 pounds and bags "rarely" exceed 30 pounds, far below the industry standard weight limit of 70 pounds. U.S. Department of Transportation Order 89-10-15, 1989 DOT Av. LEXIS 657 *4-*5 (1989).

itself acknowledged the language could bear. More importantly, it rests entirely on the meaning the court gave to the word "and" in the text, a word that does not even appear in "[t]he governing [French] text of the Convention." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). "Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991).

The French text of Article 4(4) contains no conjunction between the particulars listed in 4(3) (*d*), (*f*), and (*h*). It reads:

> [S]i le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

The absence of any conjunction in the French text means that "the original French can be read either disjunctively or conjunctively." *Distribuidora Dimsa* v. *Linea Aerea del Cobre*, 976 F.2d 90, 96 (2d Cir. 1992) (construing Article 8's list of "particulars," which also contains no conjunctions). It lends added credence to the district court's interpretation of Article 4(4) and, at the very least, saps the appellate court's contrary interpretation of inevitability.

A comparison of Article 4 with Articles 8 and 9, dealing with air waybills for cargo, further undermines the court of appeals' conclusion. Article 8, the analogue to Article 4(3), sets out the "particulars" required to be included in air waybills, and Article 9, the analogue to Article 4(4), sets out the consequences for not listing those particulars. Article 9 provides in pertinent part that

> if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the

> provisions of this convention which exclude or limit his liability.[4]

The language in Article 9, using the terms "all," "inclusive," and "and," is quite different from the language of Article 4(4), which contains none of those words. That difference strongly suggests that the drafters meant for Article 4(4) to be interpreted differently from Article 9, and lends further support to the district court's interpretation of Article 4(4) as requiring a three-fold failure to forfeit the Convention's protection. See *Bates* v. *United States*, 522 U.S. 23, 29 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[5]

At the very least, these considerations – the governing French text of Article 4(4) and the differing text of Article 9 – should have lifted the appellate court's eyes from the page. That is especially true when the result it reached (a) enforces a

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[4] The French text of Article 9 reads, in pertinent part: "Si * * * une lettre de transport aérien * * * ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité."

[5] *Accord Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (noting the Court's "duty to refrain from reading a phrase into the statute when Congress has left it out."); 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06 (6th ed. 2000) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" and "where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."); see also 87 C.J.S. Treaties § 13 (1954) (rules for construing treaties are similar to those for statutes); 1A Norman J. Singer, *Sutherland Statutory Construction* § 32.09 (5th ed. 1993) (same).

"purposeless" requirement, (b) flouts this Court's oft-repeated command that "treaties are construed more liberally than private agreements," and (c) disregards the Convention's "primary purpose of * * * limiting the liability of air carriers." *Floyd*, 499 U.S. at 535, 546 (interior quotations and citations omitted).

In particular, the court of appeals should have considered, among the additional available aids to construction, the Executive Branch interpretation of Article 4(4). We turn now to that subject.

II. THE EXECUTIVE BRANCH HAS LONG APPROVED OF THE AIRLINES' INTERPRETATION OF ARTICLE 4(4)

The Executive Branch's interpretation of treaties "is given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); see also *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 168 (1999) (citing *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-85 (1982)) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor* v. *Laubenheimer*, 290 U.S. 276, 295 (1933); *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929); *Charlton* v. *Kelly*, 229 U.S. 447, 468 (1913).

In the early years of the aviation industry, when payload weight was the primary limiting factor in long-distance air travel, airlines weighed luggage to ensure the safe operation of aircraft. See Civil Aeronautics Board Order 76-3-81, at 3 (1976). Over time, however, "changes in technology improved the operational characteristics of aircraft to the point where, by and large, the weight of the payload of a full plane does not restrict the range of the aircraft." *Id.* at 3-4. As the original justification for the weighing of bags evaporated, and with the approval of the Executive Branch, airlines stopped weighing bags as a matter of course.

Accordingly, for over 20 years the airlines have had tariffs on file with the Department of Transportation that state in pertinent

part: "For the purpose of determining liability under the convention with respect to passenger baggage acceptable for checking * * * the weight of each piece of such baggage shall be deemed to be the maximum free allowable weight for each piece of such baggage under the Rule unless the actual weight is stated on the passenger's ticket."[6] Thus, the carriers' practice of deeming missing or damaged bags to have weighed the maximum free allowable weight, if the actual weight has not been recorded, has long been known and accepted by the Department of Transportation.

The Department has also approved inter-carrier agreements containing comparable provisions. An agreement adopted by the International Air Transport Association ("IATA") provides in relevant part: "If the weight of the baggage is not recorded on the baggage check, it is presumed that the total weight of the checked baggage does not exceed the applicable free baggage allowance for the class of service concerned, as provided in the Carrier's Regulations." See Recommended Practice 1724 on General Conditions of Carriage (Passengers and Baggage) § 16.3.4. The Department approved that IATA agreement under 49 U.S.C. § 41309(b), which allows approval only when, *inter alia*, "the Secretary finds it is not adverse to the public interest * * *." See U.S. Department of Transportation Order 97-7-4 (1997) (approving procedures for flights outside the U.S.).

Moreover, for almost twenty years the Department of Transportation has advised the traveling public that the airlines' practice is acceptable. The Department's "Consumer Guide to Air Travel" states:

> On international trips, the liability limit is set by a treaty called the Warsaw Convention. Unless you buy excess valuation, the liability limit is $9.07 per pound ($20 per kilo). In order to limit its liability

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[6] Petitioner's tariffs appear at pp. 326 and 337 of the Joint Appendix in the Court of Appeals.

> to this amount, the airline must use one of the following procedures:
>
> 1) The carrier weighs your bags at check-in and records this weight on your ticket. The airline's maximum liability to you is that weight multiplied by $9.07 (or by $20, if the weight was recorded in kilos).
>
> 2) *Instead of weighing your luggage, the carrier assumes that each of your bags weighs the maximum that it agrees to accept as checked baggage, usually 70 pounds (32 kilos). This yields a liability limit of about $640 per bag.*"[7]

This long-standing Executive Department approval of the airlines' practice is entitled to great weight in interpreting Article 4(4). It reflects "the practical construction adopted by the parties," which the Court has held to be a valuable interpretative aid, *Floyd*, 499 U.S. at 535 (citations and internal quotations omitted), and the sort of "flexible implementation of the Convention's terms" that the Court has credited for the Convention's durability. *Franklin Mint*, 466 U.S. at 259; see also *Saks*, 470 U.S. at 403 ("Reference to the conduct of the parties to the Convention and subsequent interpretations of the signatories helps clarify the meaning of the term.").

In short, the court of appeals' conclusion that the Convention's terms were "unyielding" was the cause (and perhaps the result) of its failure to consider and be guided by the Executive Branch's contrary interpretation. As we now show, the court's erroneous ruling has continuing ramifications beyond the case at bar.

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[7] U.S. Department of Transportation, Aviation Consumer Protection Division, *Fly-Rights: A Consumer Guide to Air Travel*, ch. 5, p. 28 (11th rev. ed. 1998) (emphasis added) (also available on the Internet at <http://www.dot.gov/airconsumer/flyrights.htm>). Earlier editions also endorsed the carriers' practice. See, for example, the 8th rev. ed., published in 1982, at 13-14.

III. MONTREAL PROTOCOL NO. 4 DOES NOT DIMINISH THE NEED FOR REVIEW OF THE DECISION BELOW

Although Montreal Protocol No. 4, ratified by the Senate on September 28, 1998 and entered into force on March 4, 1999,[8] relieves airlines of the requirement of recording baggage weight on claim checks, the Court should nevertheless grant review and reverse the erroneous decision below, for both doctrinal and practical reasons.

First, review is warranted because, as the petition points out (at 17), "[t]he cardinal purpose of the Warsaw Convention * * * is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *Tseng*, 525 U.S. at 169 (quoting *Floyd*, 499 U.S. at 552). Yet the decision below exacerbates an already existing conflict among the many courts that have considered the meaning of Article 4(4). As the court of appeals noted, acknowledging the conflict, "it is for the Supreme Court to supply uniformity." Pet. App. 8a.

Second, review is warranted for intensely practical reasons. That is because, if allowed to stand, the decision below foretells massive litigation against the airlines. Although the industry has a superb record of handling baggage – 99.5% of checked bags in domestic transportation reach their intended destination undamaged and on the same flight as their owners[9] – the sheer number of bags conveyed is staggering. In 1999, the airlines

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[8] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, as amended by the Protocol Done at the Hague on Sept. 8, 1955, *reprinted in* S. Exec. Rep. No. 105-20 (1998) (incorporating the Hague Protocol's baggage standards).

[9] See U.S. Department of Transportation, *Air Travel Consumer Report* 17 (Feb. 2000). According to ATA statistics, of the 0.5% of bags that are delayed, 80% are returned within 24 hours, and 99% within five days. Only 0.005% of all bags are ultimately lost or stolen.

transported approximately 90 million checked bags in international travel. Assuming that the 99.5% figure applies to international as well as domestic transportation (no comparable figures for international travel exist), the remaining 0.5% translates into about 450,000 passenger reports of delayed, lost, or pilfered baggage each year. *Cf.* U.S. Department of Transportation, *Air Travel Consumer Report* 18 (Feb. 1999). If each of those passengers asserted that their lost bags were worth $5,000 (as the plaintiffs did in the case at bar, see Pet. App. 24a) instead of $640, that would amount to $2.25 billion in baggage claims last year alone.

Although not all mishandled baggage reports lead to claims for compensation, it is clear that the Court's decision whether to issue the writ will impact a huge number of potential cases. Moreover, four putative class actions have been filed against airlines seeking to reopen past baggage claims settled for the amounts of $635 or $640.[10] These suits seek to void potentially thousands of baggage claim settlements on the ground that the Warsaw Convention's liability limitations did not apply because no baggage weights appeared on plaintiffs' baggage checks. There is a risk that similar suits against other airlines, including foreign carriers, may be filed in districts across the country until March of 2001.[11] Thus, besides the actions already pending, an unknown number of future class actions against the airlines may directly rely on the disposition of this case.

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[10] In addition to the case at bar, see *Curtin v. United Airlines, Inc.*, No. 99-CV-3056 (RCL) (D.D.C.); *Lassow v. Northwest Airlines*, No. 99-CV-32689 (GK) (D.D.C.); and *Stevens v. Delta Air Lines, Inc.*, No. 99-CV-3368 (RWR) (D.D.C.).

[11] The Convention's limitations period is two years (see Article 29); March 2001 is two years from the Montreal Protocol's entry into force date.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 99-1565

IN THE

Supreme Court of the United States

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MARIA V. CRUZ, for herself and as representative of GUSTAVO CRUZ and JOAQUIN RODRIGUEZ, minors; BEATO CRUZ; SANDRA MARIA CRUZ as representative of YOVARY POLANCO, a minor; JOSE ALFREDO GOMEREZ; and LENOR DURAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents contend that certiorari is not warranted in this case because there is no conflict among the authorities, the decision below is legally defensible, and the question presented is unimportant. These assertions are without merit. Respondents effectively concede the existence of a widespread conflict among the relevant federal, state, and foreign cases by failing to cite, let alone distinguish, the bulk of the conflicting authorities discussed in the petition. Equally meritless is respondents' defense of the ruling below, which, as even the court of appeals did not dispute, adopts an interpretation of the Warsaw Convention that "has no apparent purpose" and "makes little sense." Pet. App. 7a. Indeed, respondents do not even address the textual ambiguities that fatally undermine the court of appeals' insistence on its purportedly "plain language" interpretation of the Convention. *See* Pet. 6-7, 15-16 n.9; *see also* Br. of Air Transp. Ass'n of Am. as Amicus Curiae ("ATA Br.") 2-6. And contrary to respondents' assertion, the question presented in the petition has substantial continuing importance both for currently pending cases and for future cases that undoubtedly will arise under the Warsaw Convention as modified by Montreal Protocol No. 4. Accordingly, respondents' objections are without merit, and certiorari should be granted.

I. Respondents Err In Contending That The Decision Below Can Be Harmonized With The Rule Of Interpretation Applied By Other Courts In Warsaw Convention Cases

Respondents contend that "no conflict exists as requires resolution by this Court" (Opp. 1), but their brief in opposition altogether ignores the vast majority of the conflicting authorities relied upon by American in its petition. Thus, for example, respondents do not and can-

not dispute American's showing that the rule of law applied by the court below conflicts directly with the decisions of several state appellate courts holding, in factual circumstances indistinguishable from those presented here, that technical non-compliance with the Warsaw Convention's notice requirements will not deprive airlines of their right to limited liability. Pet. 11-12 (citing *Feeney v. America West Airlines*, 948 P.2d 110 (Colo. Ct. App. 1997); *Hibbard v. Trans World Airlines, Inc.*, 592 N.E.2d 889 (Ohio Ct. App. 1990); *Lourenco v. Trans World Airlines, Inc.*, 581 A.2d 532 (N.J. Super. Ct. Law Div. 1990)). This Court has frequently granted certiorari to resolve such conflicts among federal and state appellate courts. *See, e.g.*, *Horton v. California*, 496 U.S. 128, 132 & n.3 (1990); *Montana v. Imlay*, 506 U.S. 6, 6-7 (1992) (White, J., dissenting).[1]

Similarly, without disputing American's showing that numerous federal cases construing the analogous provisions of Article 8 of the Convention have refused to follow the wooden and rigid approach to treaty interpretation adopted by the court below, respondents contend that this Court should ignore that conflict because the Second Circuit cases cited by American have not been expanded beyond their holdings. Opp. 2, 4-5. As American demonstrated in its petition, however, the Second Circuit has expressly reaffirmed its rule that the Warsaw Convention's limitations on liability must be enforced despite an air carrier's failure to observe those aspects of Article 8 that are analogous to the baggage

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[1] Respondents also ignore American's reliance on *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982), which held, in direct contrast to the decision below, that the failure to comply with the Convention's notice requirements was "simply a technical irregularity" that did not justify depriving the airline of the benefit of the liability limitation. *Id.* at 411, 412-14.

weight provisions at issue in this case. Pet. 13-14 & n.8.[2] Moreover, respondents completely ignore the fact that the Third Circuit has also adopted the rule that "a 'technical and insubstantial omission[]' . . . does not affect the Convention's limitation of liability." *Onyeanusi v. Pan Am*, 952 F.2d 788, 794 (3d Cir. 1992).

Equally unavailing is respondent's contention that these conflicting cases are inapposite because they rest on the existence of an ambiguity in the original French text of Article 8. As discussed in the petition (Pet. 15-16 n.9) and as detailed by the Air Transport Association of America in its amicus curiae brief (ATA Br. 2-6), the original French text of Article 4 contains a similar ambiguity.

Respondents also ignore the cases holding that the Convention's liability limitations are applicable despite an air carrier's non-prejudicial failure to observe the requirement that tickets and baggage checks contain a written notice of the applicability of the liability limitations. *See* Pet. 12-13 (citing *Stratis v. Eastern Air Lines, Inc.*, 682 F.2d 406 (2d Cir. 1982); *Feeney v.*

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[2] As the petition observed (Pet. 14 n.8), the Second Circuit has declined to extend this rule to other, inapposite contexts, but respondent errs in contending that the Second Circuit's approach can therefore be harmonized with the decision below. With respect to non-prejudicial technical irregularities of the type at issue here—namely, the failure to specify the number and weight of lost or damaged items—the Second Circuit squarely holds that the liability limitations are applicable. *See* cases cited at Pet. 14. Respondent also errs in suggesting (Opp. 5) that *Brink's Ltd. v. South African Airways*, 93 F.3d 1022 (2d Cir. 1996), is to the contrary. In fact, *Brinks* expressly reaffirmed the Second Circuit's rule that the omission of the number and weight of packages "does not deprive a carrier of limited liability . . . unless the omission is of practical commercial significance." *Id.* at 1033.

America West Airlines, 948 P.2d 110, 112-13 (Colo. Ct. App. 1997); *Ross v. Pan Am. Airways, Inc.*, 85 N.E.2d 880, 884 (N.Y. 1949)). As explained in the petition (Pet. 23-24) and in part III below, this conflict is particularly significant because it is also implicated by the provisions of Montreal Protocol No. 4.

Respondents err in contending that the court of appeals' decision is consistent with *Republic National Bank v. Eastern Airlines, Inc.*, 815 F.2d 232 (2d Cir. 1987). As the court of appeals itself recognized (Pet. App. 8a), *Republic National Bank* plainly conflicts with the rule of law adopted below. To be sure, the *Republic National Bank* court was careful to describe its holding in terms of the factual circumstances before the court (*i.e.*, the relatively sophisticated nature of the party whose bag was lost), but there is no basis in the Convention's text or purpose for limiting the Second Circuit's rule to that context, and it logically applies to all non-prejudicial omissions of Article 4(3)(f) particulars.[3]

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[3] As respondents note (Opp. 2), some district courts have rejected the *Republic National Bank* rule in the context of non-commercial passenger travel, but as explained in the petition (Pet. 10-11 n.6), other district courts have reached the opposite conclusion, further demonstrating the need for this Court's review. Respondents err in claiming (Opp. 2-3) that *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155 (S.D.N.Y. 1996), *rev'd in part, aff'd in part*, 122 F.3d 99, 108 (2d Cir. 1997), *rev'd in part*, 525 U.S. 155 (1999), did not involve the question at issue here. The district court in *Tseng* squarely held that "[t]he Convention also applies to plaintiff's claims for damages to her checked and carry-on luggage," despite the fact that "[t]here has been no evidence showing how much [plaintiff's] suitcase weighed." 919 F. Supp. at 158, 160. Expressly relying on *Republic National Bank*, the *Tseng* court reasoned that "[w]here the weight of a

[Footnote continued on next page]

Respondents do not even address the conflict between the decision below and the precedents of foreign courts that take a more realistic and flexible approach to the interpretation of analogous provisions of the Warsaw Convention. Pet. 15-18 (citing *Corocraft Ltd. v. Pan Am. Airways Inc.*, [1969] 1 Q.B. 616, [1968] 3 W.L.R. 1273, [1969] 1 All E.R. 82; *Dico Handel-en Industrie Mij. N.V. v. Garuda Indonesian Airways, P.N.*, No. 83 Schip en Schade 1970, 199 (Dist. Ct. Amsterdam, Oct. 29, 1969); and *Black Sea & Baltic General Ins. Co. Ltd. v. Scandinavian Airlines System* (Zurich High Court, 2d Civ. Chamber (March 4, 1966)). Respondents offer no ground for distinguishing these precedents, and there is none. As the British Court of Appeal succinctly put it in *Corocraft*, the position advanced by respondents here (and adopted by the court of appeals below) "is a highly technical point, devoid of all merit." [1969] 1 Q.B. at 651.

Moreover, as discussed in the petition (Pet. 5 & n.3, 22) and in the amicus brief submitted by the Air Transport Association (ATA Br. 6-8), American and other air carriers have long understood the Warsaw Convention to permit carriers to follow precisely the approach taken by American here, without any resultant loss of the Convention's liability limitations. That longstanding interpretation has been embodied in tariffs filed by American and other carriers and accepted by the Department of Transportation. *See* Pet. 5 n.3; *see also* ATA Br. 6-8. Accordingly, that interpretation, which is irreconcilable with the court of appeals' construction of the Convention, is entitled to deference from the courts. *See, e.g.*,

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[Footnote continued from previous page]
passenger's baggage is not noted on the baggage check, the weight may be based on the maximum allowable weight as set forth in the airline's tariff" (*id.* at 160)—precisely as American argued to the court of appeals in this case.

El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999); ATA Br. 6.

For all the foregoing reasons, it is plain that the decision below conflicts with numerous decisions of federal, state, and foreign courts, and with the Executive Branch's interpretation of the Convention. Given this Court's recognition of the special need for international uniformity in interpretation of the Warsaw Convention (Pet. 17-18), and in view of the court of appeals' admonition that "it is for the Supreme Court to supply uniformity" (Pet. App. 8a), this Court's review is essential.

II. The Court Of Appeals' Conclusion That Montreal Protocol No. 4 Is Not A Clarification Of Article 4 Requires This Court's Review

Respondents contend that *Cortes v. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 980 (2000), and *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999), are distinguishable from the decision below because this case purportedly involves a "deletion" rather than a "clarification." Opp. 5. To the contrary, however, both *Cortes* and *Tseng* involved "deletions" as well. In *Tseng*, Montreal Protocol No. 4 deleted the former provision of Article 24 which had limited the Convention's exclusivity provision to cases "covered by" specific Articles, and instead applied the exclusivity provision to "the carriage of passengers and baggage." 525 U.S. at 163, 174. In *Cortes*, Montreal Protocol No. 4 deleted Article 25's reference to "willful misconduct" and replaced it with a different formulation. 177 F.3d at 1282. Both courts nonetheless held that the newly inserted language was merely a "clarification" of the deleted text, rather than a substantive amendment. The same is true here.

Respondents make no other attempt to reconcile the approach followed below with the rule enunciated in

Cortes and *Tseng*. In fact, the inconsistency is readily apparent: *Cortes* holds that a preexisting conflict in the authorities is a "significant factor" that must be considered by the lower courts in determining whether a legislative modification is a clarification (177 F.3d at 1283); by contrast, the court below conceded the existence of a conflict in the authorities but gave that conflict no weight at all in its analysis, apparently in the erroneous belief that this Court alone should consider such matters. Pet. App. 8a-9a. Similarly, *Tseng* placed great weight on the need for international uniformity and on the Convention's goal of avoiding unlimited liability (525 U.S. at 169-71), but the court below simply ignored those considerations in favor of its single-minded and formulaic insistence on a rigid interpretation of technical requirements. These glaring inconsistencies require resolution by this Court.

III. The Question Presented Is Important And Recurring

Respondents suggest (Opp. 3) that the question presented is of no future significance because Montreal Protocol No. 4 makes clear that an air carrier's failure to specify the weight and number of bags on a baggage check will not deprive that carrier of the Convention's liability limitation. As demonstrated in the petition (Pet. 22-25), however, the question presented actually retains considerable future significance, both because of the massive class actions currently pending in the lower courts and because similar issues will continue to arise in future cases under the Convention. Indeed, respondents do not even attempt to refute American's showing that the same question of the appropriate interpretive rule will arise in future cases under the Convention as modified by Montreal Protocol No. 4, because the Convention continues to impose certain notice and delivery requirements on air carriers and provides that noncompliance with these requirements may render the liability limitations inapplicable. *See* Pet. 23 (citing Arti-

cles 3(1) and 4(1) of the Convention as amended). The question whether non-prejudicial technical omissions justify depriving air carriers of the Convention's limitations on liability is thus of continuing importance, and merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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